STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF ANDERSON) Civil Action No. 2009-CP-04-4482
)
Anderson County,)
)
Plaintiff,)
)
vs.) **CLOSING ARGUMENT FOR DEFENDANT JOEY PRESTON**
)
Joey Preston and the South Carolina Retirement System,)
)
Defendants.)

Defendant Joey Preston ("Preston") respectfully submits the instant closing argument with respect to the trial in the above-captioned matter.

I. THE EVIDENCE NEGATING PLAINTIFF'S ALLEGATIONS.

The County bottoms all of its claims on 4 nuclei of facts.[1] They include: (A) allegations regarding Heather Simmons Jones ("Jones Allegations"); (B) allegations regarding Allison Schaum ("Schaum Allegations"); (C) allegations regarding former council member Michael Thompson ("Thompson Allegations"); and (D) allegations regarding former council member Bill McAbee ("McAbee Allegations"). Each group of allegations is treated below:

A. The Jones Allegations:

1. The Allegations in the Amended Complaint:

The County has made three sets of allegations with respect to Jones. (*See* Am. Compl., ¶ 11(a)-(c).) First, according to the County, Preston participated in "creating a back-dated memo, falsely dated October 16, 2006" regarding Jones' use of a County SUV (allegations treated as

[1] Ample evidence at trial established the toxic political environment in existence at the time of the vote on Preston's Severance Agreement. It appears that little dispute exists regarding such issues. As a consequence, instead of rehashing the same issues, Preston focuses the instant closing remarks on the allegations in the Amended Complaint and the County's failure to prove its case.

"SUV Memo"). (*See* Am. Compl., ¶ 11(a)).) Second, the County contends Preston participated with Jones "in creating a back-dated memo, falsely dated October 16, 2006, providing that Anderson County would pay for the cost of Heather Jones' attending certain classes" (allegations treated as "Education Memo"). (*See* Am. Compl., ¶ 11(b).) Finally, the County alleges, "Preston participated with Heather Jones in creating a back-dated letter approving Jones' travel to Germany at Anderson County's expense (allegations treated as "Travel Memo"). The County's allegations regarding Jones have no merit whatsoever.

2. Actual Evidence of Record:

The evidence of record regarding the Jones Allegations includes the following:

- **Jones' 2006 Hiring:**

Preston testified that Jones applied for the position of Economic Development Director in 2006, a position the County had publicly advertised as reflected by Defense Exhibit 60.[2] Preston interviewed Jones and viewed her as a top-notch candidate for Anderson County. As reflected in Defense Exhibit 62, Jones had significant experience in economic development and had also served as a County Administrator in Allendale County. Jones and Preston eventually negotiated Jones' employment terms in August and September of 2006. (*See, e.g.*, Def. Ex. 63.) On September 7th, 2006, Jones sent Preston (by e-mail) a letter of acceptance and attached a summary of the offering made by Preston. (Def. Ex. 63.)

According to Preston, he initialed the summary forwarded by Jones and attached the summary to a Personnel Action Form ("PAF") thereby formalizing her employment as Economic Development Director. Both Preston and Jones testified the use of an SUV and educational

[2] Notably, Defense Exhibit 60 (p. 5 (Bates Numbered Plf_00796) listed a motor vehicle as equipment necessary for the position.

reimbursements were part of Jones' offer of employment. As a result, such terms would appear on the Jones' term summary. However, in troubling fashion, the County produced Jones' September 7, 2006 e-mail but never produced either term summary or Jones' acceptance letter.[3] Nonetheless, no dispute exists that Jones began working for Anderson County on October 16, 2006, as reflected by a contemporaneous news release. (*See* Defense Exhibit 61.)

- **SUV Memo:**

Jones testified that after she learned of Preston's intention to leave Anderson County, she approached Preston about a laundry list of clean-up items she hoped to complete before his departure. [4] Defense Exhibit 94 reflects the laundry list posed to Preston. (Def. Ex. 94.) Among the clean-up items included a query from Jones about whether her terms of employment had been included in her personnel file at hiring. (Jones Depo., 101: 21-25; 102: 1-5.) Preston indicated they had been, but when the County Human Resources Director checked, no copies could be found. (Jones Depo., 102: 1-5.)

Jones' testimony confirmed the use of a County SUV was a term of her employment. Jones further testified that she drafted the SUV memorandum (now questioned by the County) to reflect the date of her hiring in October of 2006. (Jones Depo., 125: 9-19.) Jones used the County SUV for the balance of 2006, all of 2007, all of 2008, and until her departure in 2009. (Jones Depo., 127: 20-25; 128: 1-13.) Preston's testimony was entirely consistent with Jones' testimony. Moreover, Defense Exhibit 66 reflects the County purchased the SUV for Jones in December of 2006. (Def. Ex. 66.) And Defense Exhibit 138 reflects Jones' County fuel transactions throughout 2007, 2008, and until her departure in July of 2009. (Def. Ex. 138.)

[3] Defense Exhibit 64 likewise references the summary sent by Jones, which now proves missing.
[4] Jones proved to be unavailable as a witness at trial. As a consequence, designations from her deposition were entered into the Record in lieu of live testimony.

Thus, Jones used the County SUV for two years before the Severance Agreement's execution in 2008 and for eight months after its execution – during seven months of which – Preston no longer worked for Anderson County.

Jones' W-2's, issued by the County, likewise reflected her use of the vehicle in 2006, 2007, 2008, and 2009. (Jones Depo., 128: 24-25; 129: 1-5.) Jones unsurprisingly confirmed the SUV Memorandum conferred no new benefit upon her, but instead memorialized her employment contract terms dating back to October 16, 2006. (Jones Depo., 129: 18-25.) Conversely, the County likewise incurred no new liability with respect to the memorandum memorializing the use of the County vehicle. (Jones Depo., 130: 1-4.)

Contrary to the County's representations, no evidence reflects Preston signed Jones' memorandum after November 30, 2008. Jones had no knowledge of when Preston signed the SUV memorandum. (Jones Depo., 130: 10-13.) And attached Exhibit 94 reflects Preston's intention to "take care" of Jones' concerns on Friday November 28, 2008. (*See* Def. Ex. 94.) Indeed, Preston testified he signed the SUV Memorandum before December 1, 2008. When asked why the Memorandum was dated October 16, 2006, Preston testified the Memorandum was simply intended to memorialize Jones' terms of employment at hiring on that date.

- **Education Memo:**

Anderson County's allegations regarding the Education Memo fare no better. Like the SUV memorandum, Jones testified that the memorandum regarding reimbursement for classes also constituted an agreed upon term of her employment contract dating back to October 16, 2006. (Jones Depo., p. 122: 5-20.) Jones confirmed the tuition memorandum conferred no additional benefits beyond her existing contract. (Jones Depo., 123: 10-12.) And, like the SUV

memorandum, the Education Memo was only intended to replace a prior memorandum missing from her personnel file. (Jones Depo., 123: 17-25.) Preston's testimony mirrored that of Jones.

Unlike the SUV memorandum, however, Jones believes the Education Memo may have been executed even before Friday November 30, 2008 because she discovered a typo, which she attempted to fix, but Preston had apparently executed the prior version already. (*See* Jones Depo., 132-134.) Jones further testified that she never received any tuition reimbursements from the County. (Jones Depo., 124: 14-25.) As a result, Jones never accrued any material benefit with respect to having that term and condition as part of her employment contract. (Jones Depo., 124: 22-25.) Indeed, Defense Exhibit 65, a pre-admitted e-mail dated November 30, 2009 between members of the County's Finance Department (notably sent after the County filed the instant lawsuit), confirms Heather Jones never received any educational reimbursements from the County.

- **Travel Memo:**

Finally, the testimony regarding the Travel Memo proved equally as unfavorable to the County. Jones testified she never traveled to Germany. (Jones Depo., 117: 22-23.) Nor did the County ever expend any funds on her traveling to Germany. (Jones Depo., 117: 24-25; 118: 1.) Jones further noted she only sought approval provided that she had travel money remaining in her budget. (Jones Depo., 119: 11-25; 120: 1-4.) Jones confirmed she had no intention of exceeding her existing budget, nor was she seeking an expenditure of any additional County monies beyond existing budgeted funds. (Jones Depo., 120: 9-25.) Moreover, Jones testified Preston never even executed the memorandum regarding travel. (Jones Depo., 121: 10-18.)

Preston confirmed he never executed the memorandum. Preston testified that he believed he discussed the matter with Cunningham but, due to the flurry of activity at the time, he could

not specifically recall. In any event, at the time of request regarding the Travel Memo (i.e., 12/01/08), Preston continued to work for the County pursuant to Paragraph 2 of the Severance Agreement wherein he agreed to: "assist the acting/interim Administrator in assuming and *performing* his/her duties" until December 31, 2008. (*Compare* Pl. Ex. 55 (12/01/08 Jones E-mail) *with* Pl. Ex. 7, ¶2 (Severance Agreement). While the County called Michael Cunningham (Preston's successor) to the stand during its case-in-chief, it never established Cunningham objected to Preston indicating Jones could use existing budgeted funds to travel to Germany. The County similarly failed to establish Cunningham did not consent to Preston assisting him with the performance of his new duties in such regard. Indeed, the County failed to demonstrate how Preston ran afoul of the Severance Agreement in relation to the unexecuted Travel Memo.

B. <u>The Schaum Allegations</u>:

1. The Allegations in the Amended Complaint:

Anderson County's allegations concerning the Contract with Allison Schaum appear in Paragraphs 25 through 28 of the Amended Complaint. (Am. Compl., ¶¶25-28.) According to Plaintiff, Anderson County and Allison Schaum's company, Palmetto Agricultural ("PAC"), amended an existing contract on November 1, 2008. (Am. Compl., ¶28.) The Amended Complaint fails to allege any involvement or knowledge of the amended contract on the part of then council member, Ron Wilson. (Am. Compl.) Likewise, the Amended Complaint fails to allege any correlation between the PAC contract and the Severance Agreement executed between Mr. Preston and Anderson County. (Am. Compl.)

2. Actual Evidence of Record:

The evidence of record regarding the Schaum Allegations includes the following:

- **1st PAC Contract**:

Both Schaum and Preston testified that Schaum first contacted Anderson County about her pitch for sustainable agricultural programs in the summer of 2007. Initially, Schaum and Preston met in his office. Schaum did not disclose she was Ron Wilson's daughter and Preston did not know the same. According to Preston, between 2000 and 2007, the County had sought ways to improve agricultural programs in the County, as Anderson County had many local farms. For example, the County had previously made a substantial capital investment in improving the farmer's market facilities and program.

Schaum's proposals interested Preston but, contrary to the County's suggestions, he did not award her a vendor contract in willy-nilly fashion. Preston arranged a meeting at Sullivan's Restaurant where Schaum could pitch her ideas to local farmers, school administrators, and Department of Agriculture personnel. Schaum's proposals were well-received and Preston received positive feedback from the attendees. Thereafter, Preston checked with the Department of Agriculture to ascertain what other potential vendors offered the same services. Based upon that communication, Preston learned no other comparable programs or vendors existed in South Carolina.

Preston and Schaum agreed to move forward with the First PAC Contract on a trial basis. Contrary to Schaum's desires, Preston indicated he would retain her services as a contractor, not a County employee. According to Schaum, this altered how she initially contemplated her services but, after searching the internet, submitted a proposed contract on a month to month basis. Both Schaum and Preston testified the First PAC Contract was month to month because the program was a pilot program and would be reviewed after a year. According to Schaum, Preston imposed an overall budget of forty-thousand dollars upon her.

Schaum testified she never discussed the formation of PAC in 2004 with either her father or mother. She similarly never discussed her contacting Anderson County with her father or mother before doing so in 2007. Schaum testified that she had never heard of Preston before initiating contact with Anderson County in 2007. Schaum testified her father did not know she was pursuing the First PAC Contract. And, when Ron Wilson learned of the same, he was displeased.

During the first year, the PAC programs required substantial preliminary work. Schaum helped bring several sustainable agricultural programs to Anderson County and helped establish the Farm to School Program. Throughout the first year, Preston testified he received monthly reports from Schaum about PAC's progress (*see* Def. Ex. 67 (PAC monthly reports)) and he, in turn, provided County Council with reports on PAC's progress in his monthly Administrator's reports. At the conclusion of the trial year, Schaum helped bring a major conference to Anderson County, which proved highly successful. (*See* Def. Ex. 68 (11/03/08 Schaum E-mail to Preston.) On or about the same time as the conference commenced, Schaum asked Preston to evaluate PAC's initiatives and submitted a proposed amended contract.

- **Amended PAC Contract:**

According to Schaum, she drafted the Amended PAC Contract on her own, again resorting to the internet for sample contract. Like the First PAC Contract, Schaum testified her father did not know she sought assessment of PAC's work, nor did he know she sought an amended contract. In short, Ron Wilson did not participate in or know about the Amended PAC Contract in any way.

Schaum similarly knew nothing of Preston's employment issues with the County and had no discussions with her father about PAC's contracts or work. Schaum had no discussions with

her father about Preston, his employment dispute or his Severance Agreement. According to Schaum, she and her father simply did not have a relationship where she discussed her professional life with him or where he discussed County politics with her. Schaum did not even know her father served on the Personnel Committee. Moreover, Ron Wilson was never benefitted in any way by PAC or PAC's contracts with the County.

Schaum testified that she included the termination provision because she believed three years would be necessary to shore up the programs she had started. Both she and Preston testified that inclusion of a termination provision proved advantageous because—at that point—school districts and farmers had committed to the programs and they believed such parties needed assurances the program would continue to exist. Schaum agreed that unlike the First PAC Contract, the Amended PAC Contract did not contain any minimum amount of services the County had to allow PAC to work.

Preston testified he also believed the Amended PAC contract provided an additional benefit. According to Preston, he increased the number of hours in the termination provision from twenty to thirty to allow for funding of the Amended PAC Contract over the three year term. However, since the amended agreement provided for no minimum number of hours of service, if the County later needed the resources elsewhere, funds could simply be transferred to where needed most. In this way, Preston noted the County could meet the commitments to third-parties in keeping the programs viable, but had an escape hatch if necessary.

While the County portrays the Amended PAC Contract as "rich" agreement, Dr. Charles Alford, the County's own expert economist, conceded the amended agreement contained no minimum hourly requirement. According to Dr. Alford, the County could reduce PAC's hourly services to an hour a week, which would reduce PAC's compensation over a three year period

totaling less than fifteen thousand dollars ($15,000.00). Dr. Alford admitted the termination provision only came into play if the County elected to terminate the Amended PAC Contract, which would make no sense in light of the lack of any minimum hourly requirement.

In short, the County has not, and cannot, establish Schaum accrued a material benefit by virtue of the Amended PAC Contract.[5] While fast to assail Schaum's work and credentials, the County proves equally slow in rebutting the fact that Schaum's work resulted in over two hundred thousand dollars ($200,000.00) in grants benefitting Anderson County—an amount far exceeding what PAC ever received. Moreover, all evidence of record rebuts any suggestion that any connection existed between the Amended PAC Contract and Ron Wilson's vote in favor of the Severance Agreement. Both Schaum and Preston alike confirmed one had no bearing on the other.[6]

C. <u>The Thompson Allegations</u>:

1. The Allegations in the Amended Complaint:

According to the County, while Council was considering Preston's claims for anticipatory breach of his employment contract, "Preston was engaged in conversations with" Michael Thompson ("Thompson") "about hiring him as a county employee." (Am. Comp., ¶ 12.) The

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[5] The County appears enamored with the notion that—after Preston left the County—he, like hundreds of Anderson County residents, attempted to invest in silver holdings with Ron Wilson's company. Besides the fact that Preston never made such an investment until *afterwards*, and besides the fact that the County has failed to establish any relationship between the two, the County overlooks the dire financial straits such investment has inflicted upon Preston. Preston testified that he is now working with the federal receiver to explore repayment of funds he invested in bricks in mortar. It appears plain the County endeavors to interject such issues, not because of their materiality to this dispute, but because of the sensationalistic impact they hope to obtain from it. In truth, however, the investment has caused a dire financial impact on Preston, which will take an exorbitant amount of time to overcome.

[6] Notably, County Council never voted on the Amended PAC Contract, nor took any action relating to the same.

County further contends Preston "granted Thompson special consideration" in connection with his desire "to be hired as a county employee." (Am. Compl., ¶13.) The County also complains that Preston failed to correct a statement made by Thompson to the media in June of 2008 (nearly ninety days before Preston's employment dispute even arose) wherein Thompson apparently denied interest in becoming a County employee. (Am. Compl., ¶ 17.)

2. Actual Evidence of Record:

The evidence of record regarding the Thompson Allegations includes the following:

- **Thompson Seeks Employment in March of 2008.**

Both Preston and Thompson testified that he approached Preston in the beginning of March 2008 and inquired whether the County had any interest in hiring him after he rotated off County Council at the end of December 2008.[7] (Thompson Depo., 44:18-25; 45:1-10.) According to both Thompson and Preston, Preston believed Thompson's background would be a good fit for the County. (Thompson Depo., 45:1-10; 153:6-7.) Thompson: had an MBA (Thompson 45:1-10) and had nine years of purchasing experience with the Bosch Corporation wherein he managed a commodity portfolio worth fifty-six million dollars (Thompson Depo., 153:8-17); had a real estate license and a background in real estate (Thompson Depo., 18:1-13; 45: 1-7); and was honorably discharged from the United States Navy (Thompson Depo., 23:23-25) where he held a top secret security clearance. (Thompson Depo., 155:22-25; 156:1).

During the March of 2008 timeframe, some interest arose on the part of Thompson in pursuing a position in the assessor's office. (Thompson Depo., 45:1-10.) Preston testified (and the County did not rebut) that the transfer of an elected official into County employment had occurred before. As a consequence, in Preston's view, Thompson's request neither struck him as

[7] Michael Thompson was unavailable as a witness at trial. As a result, his testimony was entered by deposition designation.

odd nor improper. Thompson, as a result, began evaluating potential appraisal courses in the Spring of 2008. In this regard, Thompson's testimony is accredited by Plaintiff's Exhibit 35 wherein Thompson sent an e-mail to Preston on March 4, 2008 regarding potential appraisal courses. (Thompson Depo., 45:1-10; *see also* Ex. 35.) Importantly, ninety days before the June of 2008 primary and six (6) months before Preston's employment dispute with the County arose, Thompson had asked Preston for a County position and Preston indicated he would hire him due to his credentials.

Preston testified that he could represent to Thompson as early as March of 2008 that he would hire him. According to Preston, less than five percent (5%) of County employees had Master's level degrees and the applicant pool would include an even lower percent. Preston, then, as the County Administrator had a high level of certainty that Thompson could be hired after he rotated off County Council.

While the County portrays such hiring as preferential treatment, the County has not, and cannot, refute such employment discussions occurred as early as March of 2008. The County cannot refute Thompson would be preponderantly overqualified for the vast majority of positions that might later become available (such as the Buyer II position for which he was hired). And, most of all, in light of such undisputed facts, the County cannot explain how such facts do not refute its summary conclusion that Thompson's severance vote—occurring eight and half months later—was tainted by such facts.

- **Thompson's Statement to Anderson Independent Mail.**

When questioned about his statement to the Anderson Independent Mail where he denied having interest in a County job, Thompson openly conceded he made such statement. (Thompson Depo., 65:18-23.) Thompson explained that he viewed the matter as a personnel

matter, which was not appropriate for public discussion. (Thompson Depo., 65:25; 66:1-3.) According to Thompson, Preston, and also the testimony of Michael Cunningham, County policy was to treat personnel matters as confidential. Plaintiff's Exhibit 38 confirms this testimony. (*See* Pl. Ex. 38 (8/14/08 Preston E-mail to Kathy Fulbright).

Thompson also testified that he feared two Council members, Cindy Wilson and Bob Waldrep, would disseminate confidential information about him had he answered otherwise.[8] (Thompson Depo., 144:4-25; *see also* Def. Ex. 136, 2/7/08 Thompson letter to Crenshaw.) To exacerbate the situation, during this timeframe, Anderson County politics had devolved into an acidic climate where Thompson and the other Council members (except Cindy Wilson and Bob Waldrep) were receiving anonymous, harassing letters. (Thompson Depo., 129:13-25; 130-1-23.) Thompson cited one letter received at his home where the author threatened to "sodomize" him because of his involvement with Council. (Thompson Depo., 129:13-25; 130:1-25.) Thompson testified he feared the same individuals who had been sending the harassing letters might misuse the personnel information about his pursuing a job. (Thompson Depo., 145:25; 146:1-6.) And the circumstances caused him to fear for his own safety. (Thompson Depo., 146:1-6.)

In any event, Thompson confirmed his belief that it was not the County Administrator's job to monitor statements made by county officials to the media. (Thompson Depo., 154:1-8.) Nor was it Preston's job to correct incorrect statements made by Council members. (Thompson

[8] Thompson cited other instances where Council members Wilson and Waldrep had, in his view, dessiminated confidential information, which gave rise to the concern. (Thompson Depo., 143:17-25; 144:1-25.)

Depo., 154:9-11.)[9] Thompson recalled incorrect statements made to the media by both Council members Cindy Wilson and Bob Waldrep, which he similarly viewed as beyond Preston's job to monitor and correct. (Thompson Depo., 154:20-23.) In fact, Thompson agreed it would be better for Anderson County if the County Administrator did not go behind elected officials and try to correct their public statements. (Thompson Depo., 154:24-25; 155:1-4.)

The County suggests Preston, as the County Administrator, had an affirmative duty to correct Thompson's inaccurate statement to the media. Importantly, however, the County altogether failed to establish Preston even knew about Thompson's misstatement to the media. Even assuming Preston had such a duty, which proves unimaginable, Preston cannot be charged with correcting misstatements about which he was unaware. And, indeed, Preston did not even know of the statement until after he left the County.

- **Thompson Seeks a Position in August of 2008.**

Both Preston and Thompson testified Thompson pursued the position of Assistant Purchasing Manager with Anderson County in August of 2008. (Thompson Depo., 67:9-25.) E-mail correspondence from Thompson confirms the fact. (Pl. Ex. 38, 8/14/08 e-mail.) According to Thompson, he inquired about the position but Preston indicated Adriene Hicks Williams, the current Buyer II in purchasing, would be promoted into the position. (Thompson Depo., 69:9-17.) A close review of Plaintiff's Exhibit 37 accredits Thompson's testimony. On the top left-hand corner of Plaintiff's Exhibit 37, it states: "Adriene Williams per Robert Closeout 8-29-08." (Pl. Ex. 37, 8/5/08 Asst. Purchasing Mgr. Ad.) Further consistent with his testimony, Thompson's name nowhere appears on the attached list of applications.

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[9] County Council Chairman, Tom Allen, agreed the County Administrator did not have a duty to police the media statements of Council members. (*See* Allen Depo., 142: 10-19) ("Q. It would be inappropriate for the underling [County Administrator] to police the media statements of his employer, would it not? A. It would, yes.")

After submitted his name for the Assistant Purchasing Manager position, Preston informed Thompson the promotion of Williams would create an opening in her position, which (unknown to Thompson) was the Buyer II position. (Thompson Depo., 69:9-17.) According to his testimony, Preston indicated he would hire Thompson into the position opened by the internal promotion of Williams. (Thompson Depo., 70:1-25.)[10] This conversation occurred nearly a month before Preston's employment dispute with the County ever arose. (Thompson Depo., 73:9-20.)

A close review of Plaintiff's Exhibit 42 further confirms both Thompson's and Preston's testimony. On Plaintiff's Exhibit 42, which is the advertisement for the Buyer II position, only one name appears on the list of applicants—Michael Thompson. The Buyer II position, as confirmed by Preston's testimony, was formerly held by Adriene Williams who was promoted some time after August 29, 2008. Only one name appears because, as Preston recalled, the County would not treat Thompson, who then served on County Council, as a new hire but instead as a transfer. In instances of transfers, the position does not have to be opened to the public, when a qualified internal candidate already exists.

Interestingly, little debate can exist Thompson far exceeded the credentials required for the Buyer II position identified by Preston in August of 2008. For example, the Buyer II job required a bachelor's degree in business, marketing, or accounting. (*See* Ex. 42.) Thompson had an MBA. (Thompson Depo., 153:3-7.) The position required four years of progressively responsible supervisory work. (*See* Ex. 42.) Thompson had 9 years at Bosch. (*See* Thompson

[10] Notably, Thompson did not know the person's name or exact buyer position. But Preston's testimony and the exhibits confirm Thompson's more general recall as unequivocally true.

Depo., 153:8-12.) And Thompson was honorably discharged from the Navy. (Thompson Depo., 153:18-20.)[11]

As a consequence, the documentary evidence of this case unequivocally substantiates the testimony of both Preston and Thompson. Thompson approached Preston in March of 2008 for the first time about County employment. Preston agreed he was a good candidate. In August of 2008, Preston identified the Buyer II position as the position in which Thompson would be transferred. And the exhibits confirm the testimony exactly as provided by Preston and Thompson. However, both Thompson and Preston also testified that Preston executed a Personnel Action Form for Thompson's transfer into the Buyer II position. Yet, unfortunately, the County never produced the PAF. It is highly puzzling how yet another key piece of evidence should prove missing.[12]

Like all other witnesses in the case, Thompson testified he received no benefit by the approval of Preston's severance agreement. (Thompson Depo., 158:7-9.) Preston received no benefit from his pursuit of a job from the County. (Thompson Depo., 158:1-6.) No *quid pro quo*

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[11] The County also expends much energy on the training received by Thompson. However, the County almost always neglects to mention Thompson's training began in September of 2008, before Preston's employment dispute arose. (*See* Def. Ex. 11, 12, & 13.) Moreover, the County never rebutted Preston's testimony that County policy allowed Council members to pursue whatever training they desired. And the County never rebutted Preston's testimony that he lacked the authority to reject requests for training if made by Council members. Finally, the pre-approval of training for Thompson circumstantially accredits both Thompson's and Preston's testimony. If both Thompson and Preston believed Thompson would continue working for the County, it makes perfect sense that Thompson would complete the training he had, at that point, already half-completed. Preston testified that he believed such training would be quite useful in purchasing due to acquisitions of property interests frequently made by the County.

[12] It should be noted that Preston does not mean to insinuate that counsel for the County has done anything improper in relation to missing documents. Preston does suggest, however, that the litany of missing, key pieces of evidence does, from his view, suggest the County has acted improperly.

exchange existed between the severance agreement and his pursuit of a County job. (Thompson Depo., 157:1-25.) Indeed, no relationship existed between the two whatsoever. (Thompson Depo., 156:23-25; 157:1.) Preston agreed to transfer Thompson in August of 2008 into the position of Buyer II, before the proposed Severance Agreement or employment dispute ever arose (Thompson Depo., 158:22-24) and Thompson testified he would have voted in favor of the Severance Agreement regardless. (Thompson Depo., 159:1-11.)

Contrary to the County's suggestions, Thompson testified he favored the Severance Agreement because the political infighting over Preston had begun to threaten potential economic development initiatives. (Thompson Depo., 150:6-10.) Thompson did not believe it served the County's "best interest to go through a drawn out litigation process." (Thompson Depo., 150:19-21.) And Thompson confirmed he did not believe it served the County's best interests to spend two million dollars investigating Preston – as it has. (Thompson Depo., 150:6-25.) In sum, Thompson testified that he believed County politics had become so acidic at this timeframe, in his view, approving Preston's Severance Agreement best served the public.

D. <u>The McAbee Allegations</u>:

1. The Allegations in the Amended Complaint:

The County levels various allegations against McAbee, although it never alleges explains how such allegations actually relate to his vote in favor of Preston's Severance Agreement. (*See* Am. Compl., ¶¶30-33.) First, the County complains about the purchase of a tract of real estate on Lewis Drive in Anderson County by a company named B&B Properties. None of the allegations against McAbee prove supportable, even if they otherwise supported a claim, which they do not. Second, the County contends Preston approved travel reimbursements for Mr. McAbee, which it contends were somehow improper. (Am. Compl., ¶ 31.)

2. Actual Evidence of Record:

During the trial, the County all but conceded its allegations regarding McAbee wholly lack merit. Indeed, the McAbee Allegations make no sense from a chronological standpoint. While Preston did not even assert his claim for anticipatory breach until September 25, 2008, McAbee received the real estate commission (questioned by the County) five months before on April 23, 2008. (*See* Pl. Ex. 60, 4/23/08 Commission Check.) At this point in time, the primary elections for County Council had not even occurred. Thus, not only had Preston not asserted a claim against the County, but, as of April of 2008, no one even knew the composition of Council would change – or to what degree.

Predictably, then, McAbee confirmed his commission from April of 2008 did not relate in any way to the employment dispute involving Preston, which did not exist yet. The commission was not, nor could it be, part of some *quid pro quo* exchange with Preston. And the real estate commission had no relationship whatsoever with the vote McAbee cast in November of 2008 in favor of Preston's Severance Agreement. Moreover, at trial, the County utterly failed to demonstrate that Preston had anything to do with the commission received by McAbee.

According to McAbee, the deal for which McAbee received a real estate commission originated at the end of December 2006. (*See also* Def. Ex. 59, 12/12/06 Purchase Contract.) Through options to extend the Contract, the Contract did not close until April of 2008, when McAbee received his commission. At all times when votes occurred relating to the subject property, before, during, and after the sale, McAbee recused himself. (*See, e.g.,* Ex. 58, McAbee Recusals.) McAbee recused himself no less than five (5) times. Simply no relationship exists between the commission received by McAbee and the Severance Agreement vote.

The County's allegations regarding travel reimbursements similarly lack any basis. As an initial matter, the County can make no showing how McAbee gained any "benefit" from such travel expenses, as they were merely reimbursements. Moreover, the vast majority of travel reimbursements, about which the County complains have no temporal relationship to either Preston's employment dispute – or – the Severance Agreement vote. For example, the County complains of travel expenses from: January of 2007 through August of 2008. None of this travel bears even a temporal relationship with Preston's Severance Agreement. To the extent he needed to, McAbee confirmed none of his travel expenses had anything to do with Preston's vote, let alone the ones occurring before the employment dispute ever arose.

Both McAbee and Preston testified that County policy did not restrict a Council member's travel expenses for economic development purposes. Preston testified that, on one previous occasion, he sought to avoid signing off on travel expenses for a Council member.[13] In Preston's view, it placed him in an uncomfortable position if he thought the travel expenses were improper. However, the County's auditors instructed Preston he had to sign-off on such expenses for audit purposes. The County Attorney also advised Preston that he had to sign-off on such expenses and that it was not his role police the propriety of such expenses, as Council members owed legal duties to the County and public to ensure such expenses were appropriate. As such, the County Attorney advised Preston that he had to sign-off on such expenditures in a ministerial capacity and the Council members, as his employer, would be ultimately responsible if the expenses proved somehow improper. When questioned, McAbee agreed with Preston's

[13] Preston testified that he previously raised issues about the propriety of certain travel expenses of Council member Cindy Wilson. It was on this occasion, the County Attorney informed him he had to sign-off on such expenses in a ministerial capacity. Interestingly, Wilson testified that Preston refused to reimburse expenses of hers. Yet, later in the trial, Preston testified the expenses she referenced related to copying fees for Freedom of Information requests, not travel expenses as testified by Wilson.

testimony in this regard and added that, in his view, Preston lacked authority to deny such expenses.

During trial, the County altogether failed to rebut both Preston's and McAbee's testimony Preston's role in approving Council travel expenses was ministerial in nature. To the extent not already dead, such evidence effectively eliminates travel expenditures from the lawsuit altogether. If Preston lacked authority or discretion to reject such expenditures, the County cannot now claim an inference of impropriety from their ministerial approval.

Moreover, the extremely limited McAbee travel expenses occurring after Preston's employment dispute arose occurred for legitimate economic development reasons identified by McAbee. One related to the Rail Trends Conference, which McAbee also attended the year before. The other related to a coal gasification conference, which McAbee explained in detail at trial. Both McAbee and Preston denied such travel expenses had any relationship to Preston's Severance Agreement. According to both, one had no bearing on the other. And, the County did not, and could not, introduce any evidence to the contrary. Moreover, all such reimbursements occurred well before the Severance Agreement vote ever occurred on November 18, 2008.

II. LEGAL ANALYSIS CONCERNING PLAINTIFF'S RESCISSION CLAIMS.

The Court should enter a verdict favoring Preston for the following reasons:

A. All Claims Alleged By the County Warrant Immediate Dismissal.

The County's claims fail for the following fifteen (15) reasons:

(1) <u>As to All Causes of Action</u>: the Court Cannot Now Return the Parties to the Status Quo As Existed Before the Parties Executed the Severance Agreement.

Every claim alleged by Plaintiff seeks rescission as the remedy.[14] However, "[i]n the absence of fraud, which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984) (citing *Rice and Santos, Inc. v. Jones,* 279 S.C. 201, 305 S.E.2d 74 (1983); *Hester v. New Amsterdam Casualty Co.,* 268 F. Supp. 623 (D.S.C.1967)).[15] Since Plaintiff cannot support its claims for fraud (causes of action four and six), the Court should dismiss the County's claims.

Ample legal authority supports the proposition. In *King v. Oxford*, the Court of Appeals of South Carolina found that the *status quo ante* could not be restored where a business was transferred to a party who, in reliance on the contract, personally assumed certain liabilities of the company, obtained a letter of credit and a loan in order to continue the business. *Id.* The court found that the party had "suffered a definite and substantial change of position in reliance on the contract," and that he "would be materially prejudiced by a rescission of the contract." *Id.* at 313–14, 318 S.E.2d at 129. The court further concluded that because the party seeking rescission "cannot, as a practical matter, restore [the other party] to his former position, . . . [the

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[14] At one point, the County raised questions about Preston contacting the State Retirement Fund in July of 2008. It is unclear exactly why the County believes this proves significant. However, as Preston testified, in the Summer of 2008, he faced several challenges. First, Preston was going through a divorce and negotiations to resolve the same had raised the value of his retirement benefits as an issue. Second, the political threats to oust Preston had reached an all time high. Third, Brooks Brown had reported to him that, in July of 2008, Tom Allen had indicated a plan to get rid of him. Second, and at the same time, Preston was trying to negotiate a resolution to his divorce. Accordingly, Preston acknowledged contacting the SRS in the Summer of 2008 to obtain retirement information allowing him to analyze exactly what his options were.

[15] *See also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004) ("Rescission, as a remedy, returns the parties to the status quo ante.") (citing *Gov't Emps. Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970)).

party seeking rescission] is not equitably entitled to rescission . . . ." *Id.* at 314, 318 S.E.2d at 129. This analysis applies to the facts *sub judice*.

Here, rescission cannot restore the Parties to their former positions for nine (9) reasons. They are:

(1) Someone else (Rusty Burns) now holds the position of County Administrator;

(2) For all practical purposes, the County could not otherwise restore Preston to his prior position as County Administrator due to the polarization of the Parties;

(3) Preston's employment contract lapsed and, thus, no longer remains in force and effect. (Pl. Ex. 1, Preston Master Employment Agreement, §2.)

(4) Having not worked as County Administrator from January of 2009 through trial, Preston cannot regain his lost service time as a state employee;

(5) Preston paid a large portion of the Severance monies to state and federal taxing authorities, which cannot be recouped;

(6) Preston no longer has the financial ability to repay the Severance monies. (Pl. Ex. 91.)

The Parties, therefore, cannot be restored to their respective subject positions before they executed the Severance Agreement. Accordingly, since the County's fraud-based claims altogether fail, rescission proves unavailable as a remedy. A verdict should be entered in Preston's favor as to all claims.

(2) <u>As to All Cause of Action</u>: the County's Claims Fail Pursuant to the Supreme Court Holding in *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999).

The County's claims all fail pursuant to the holding of *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999).

(a) Council Action Can Only Be Undone If A Disqualified Vote Proves Outcome Determinative.

Under *Baird,* County Council's action can only be undone if the allegedly improper votes prove outcome determinative. Adopting the overwhelming majority position nationwide, the *Baird* Court ruled:

> In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered **may not be counted in determining the necessary majority** for valid action. *See* W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue,* 43 A.L.R.2d 698, 748 (1955). Therefore, a court has jurisdiction to invalidate an ordinance **if the requisite number of votes to pass the ordinance would not exist but for the improper vote**.

Id. at 535, 511 S.E.2d at 77-78 (emphasis added).[16]

No legitimate dispute can exist about *Baird*'s holding. The *Baird* Court specifically cited and followed an American Law Reports chapter discussing vote counting in the presence of alleged disqualification. *Id.* at 535, 511 S.E.2d at 77 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2D 698, 748 (1955). The relied upon A.L.R. states:

> Some questions have arisen in regard to the determination of a majority where some of the council members present are disqualified to act in regard to the subject matter of the particular vote.... **[T]he council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.**

[16] In telling fashion, during the hearing on Preston's Motion to Dismiss, the County misstated the holding of the *Baird* opinion to the Court. The County told the Court that, under *Baird,* "[The vote] could have been 5-2 and it wouldn't make any difference because one vote taints the process," *see* Exhibit A, Transcript, p. 40. *Baird* contained no such language. To the contrary, *Baird* supports exactly what Preston cited to the Court at that time: *even discounting Thompson's, Wilson's, and McAbee's votes would make no difference since the Severance Agreement would still have been approved by a majority vote.* The County similarly failed to inform the Court that *Baird* involved a "critical vote"—a vote the South Carolina Supreme Court specifically noted as the "tie-breaking vote." *Id.* at 534, 511 S.E.2d at 77.

Id. at § 2 (Emphasis added). The position urged by the County simply ignores this analysis, which was expressly adopted by the *Baird* Court. Thus, contrary to the County's stated position, the question is whether: disregarding the allegedly disqualified votes, would County Council still have approved Preston's Severance Agreement. The answer is yes.

In fact, back when the law firm now representing the County argued the *Baird* case, they told the South Carolina Supreme Court that the law was the exact opposite of what they now argue. Their brief in the *Baird* case recited the law as:

> While it is true that "[c]ourts are not concerned with the motives which actuate members of a legislative body in enacting a law," 56 AM. JUR. 2D *Municipal Corporations* § 393 (emphasis added), it is equally true that "[i]t has been frequently held that the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action," id. § 172. **Based on the latter principle, courts have reviewed municipal ordinances and held them to be invalid where, as in this case, the deciding vote was cast by a council member who was disqualified to vote.** *See* W.J. Dunn, Annotation, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748-50 (discussing cases).

(Final Brief of Appellants, *Baird v. Charleston County*, p. 8 attached as Exhibit B to Preston's Prior Memo. Supp. Mot. to Dismiss, p. 8)[17] (emphasis added) (brief submitted by Wyche Law Firm and signed by former counsel of record for the County in this case, Attorney Carl Muller) (*n.b.*, citing 43 A.L.R.2d 698, quoted above) (emphasis added). The brief even cited the exact A.L.R. followed by the *Baird* decision. *Id.* Now, in a different Court before a different judge, the County's lawyers about-face and inform this Court that the law is different than what they argued to the Supreme Court and was adopted in *Baird.*

[17] The prior brief submitted by the County's law firm appears in the Court Record as Exhibit B to Preston's Supplemental Brief Supporting his Motion to Dismiss. Likewise, the transcript from the prior hearing is also attached to the same Memorandum.

As noted *supra*, *Baird*'s analysis accords with the overwhelming majority of cases from across the nation. "Where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the results." 43 A.L.R.2d at § 27[b].[18] And, not only does *Baird* follow this reasoning, other similar provisions of the South Carolina Code also adopt the same analysis. *See, e.g.*, S.C. CODE ANN. § 33-8-310 ("a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect

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[18] *See, e.g., Marshal v. Ellwood*, 189 Pa. 348, 41 A. 994 (1899) ("It would be an astonishing proposition to submit that an ordinance..., which was passed by a considerable majority of perfectly qualified votes, should be declared illegal because it had received the supporting vote of one member who was disqualified."); *Anderson v. City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972)("It is also the rule that where the required majority exists without the vote of the disqualified member, his presence and vote will not invalidate the result"); *Hodge v. Princeton*, 227 Ky. 481, 13 S.W.2d 491 (1929) (considering the disqualification of one of four votes); *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N.W. 953 (1916) (reducing number of votes to 15 due to failure of 9 members to participate); *Commonwealth ex rel. Whitehouse v. Raudenbush*, 249 Pa. 86, 94 A. 555 (1915) (disqualifying vote of interested council member); *Alamo Heights v. Gerety*, 264 S.W.2d 778 (Tex. Civ. App. 1954); *Meixell v. Borough Council of Hellertown*, 370 Pa. 420, 88 A.2d 594 (1952)("Since the vote of 2 councilmen was illegal and void, neither their vote nor their presence should be counted in computing a quorum or a majority.") (citing McQuillen, MUNICIPAL CORPORATIONS, 3rd ed., vol. 4; *City of Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N.E. 215 (1892), *Sup'rs of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879), *Woodward v. City of Wakefield*, 236 Mich. 417, 210 N.W. 322 (1926)); *Saks & Co. v. Beverly Hills*, 107 Cal. App. 2d 260, 237 P.2d 32 (1951) (5 votes, 3 disqualified, left 1 to 1 vote)(overruled on other grounds as to trial de novo issue by later opinion); *State ex rel. Oakey v. Fowler*, 66 Conn. 294, 32 A. 162 (1895) ("if his own vote was necessary to give a majority of the board of selectmen, we should feel compelled to hold his election to be void."); *Ft. Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N.E. 215 (1892)("sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton."); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289 (1931)("The vote was unanimous and he was but one of three."); *Beale v. Santa Barbara*, 32 Cal. App. 235, 162 P. 657 (1916); *Murach v. Planning & Zoning Commission of City of New London*, 196 Conn. 192, 491 A.2d 1058 (1985)("where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result."); *Klindt v. Pembina County Water Resource Bd.*, 2005 N.D. 106, 697 N.W.2d 339 (2005)(question is whether vote was "determinative:); *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A.2d 92 (1956); *Board of Com'rs of Richmond County v. Thompson*, 216 Ga. 348, 349, 116 S.E.2d 737, 738 (1960) (reducing vote count by two).

interest in the transaction."); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524 (1951) (In examining vote of hospital board, trustee "should have disqualified himself from participation in the consideration of the proposal and should not have voted thereon; this reduces the favorable vote to five....").

Applying *Baird* as controlling authority in South Carolina, Anderson County's complaint must be dismissed. The resolution at issue in the matter passed by a 6 to 1 margin.[19] Even disqualifying the three votes (as advocated by the County), a majority vote of 3-1 remained. Under South Carolina law, the Severance Agreement remains fully valid and Paragraphs 6 & 8 of that agreement create a full bar to suit. (*See* Pl. Ex. 7, Severance Agreement, ¶¶6 & 8 ("The County agrees and hereby **covenants** irrevocably **never to make any claim** or demand, or to commence, cause or permit to be instituted or prosecuted, any claim, charge, proceeding **or action at law or in equity against Mr. Preston**.")(Emphasis added.)[20] Accordingly, the County's Complaint warrants immediate dismissal.

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[19] Initially, County Council approved the Severance Agreement by a 5 to 2 vote. Notably, Council then approved the Severance Agreement a second time following a period of additional debate and reconsideration. Upon this second vote, the resolution adopting the agreement passed by a 5 to 1 vote, with one council member abstaining. However, under Anderson County Code §2-37(g)(3), "Any member who does not record a negative vote or declare himself as not voting shall be recorded as voting in the affirmative." Thus, upon the second vote, the abstaining vote is counted as an affirmative vote rendering the final tally a 6 to 1 vote.

[20] Paragraph 8 states:

> 8. The County agrees and hereby **covenants** irrevocably **never to make any claim** or demand, or to commence, cause or permit to be instituted or prosecuted, any claim, charge, proceeding **or action at law or in equity against Mr. Preston**, his heirs, legal representatives, or assigns, by reason of any claim, demand or cause of action which the County may now have, or may hereinafter acquire, relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County, expressly including, but not limited to, **all actions taken by**

(b) *Baird* Does, However, Disqualify Both Wilson's and Waldrep's Negative Votes.

Moreover, applying *Baird* to the instant case (which was pled as the Ninth Affirmative Defense), the two negative votes (those of Bob Waldrep and Cindy Wilson) against Preston's Severance Agreement must be discounted. During trial, testimony from Bob Waldrep and Cindy Wilson (by deposition) confirmed both knew in October of 2008 that Preston was asserting tort claims against them. (*See also* Pl. Ex. 22, 10/23/08 Hoskins' Demand Letter.) Both acknowledged the two Council members identified in the October 23, 2008 demand letter referred to Wilson and Waldrep. Under the Master Employment Agreement, §3, ¶E, Preston only had an obligation to provide Anderson County, not individual Council members, with a release relating to employment claims. By contrast, in Paragraph 6 of the Severance Agreement, Preston released all *Council* members from liabilities arising out of his employment.

Preston only raised claims against Waldrep and Wilson. As a consequence, under both the State Ethics Act and Anderson County Code §2-37(g)(4), both Waldrep and Wilson possessed "personal financial interests" in the outcome of the vote on Preston's Severance Agreement thereby disqualifying their participation.[21] Notably, Preston never indicated any intention of

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Mr. Preston within the scope and course of his employment as County Administrator.

(Pl. Ex. 7, Severance Agreement, p. 3, Exhibit A to Preston Memo. in Supp.) (emphasis added.)

[21] The County has suggested that since Waldrep and Wilson voted negatively that their automatic disqualification is somehow reversed. This is simply untrue. Neither the State Ethics Act nor Anderson County Code carves out an exception to disqualification based upon how the individual later casts their vote. The County also suggests that because all Council members received a release from the Agreement that Waldrep and Wilson's vote should not be disqualified. This too rings hollow. Preston never raised any claims against any of the other Council members. As such, those members received no financial benefit different from the Anderson County public at large. By contrast, Wilson and Waldrep impermissibly did. As a consequence, the County can nowhere rely upon Wilson's and Waldrep's votes when arguing

pursuing tort claims against any of the other Council members. Thus, as to the remaining Council members, their respective interests remained the same as the public at large.

(3) <u>As to All Causes of Action</u>: The Evidence of Record Refutes the County's Allegations Pertaining to Jones, Schaum, Thompson, and McAbee.

No evidence of record supports the County's claims. The County cannot dispute that Wilson, Thompson, and McAbee, or any direct family member, received a benefit merely by virtue of their votes in favor of Preston's Severance Agreement. For example, the facts of this case do not present a *Baird* scenario where a council member voting on a bond issue worked for the entity benefited by bond revenues. Here, the benefit of the Severance Agreement inured to the benefit of Preston personally and to the County as a whole.

For any claim of the County to survive, something else must exist. But, as discussed *supra*, *nothing* else existed:

- Wilson never knew about PAC's Amended Contract. Wilson was never benefitted by PAC. Schaum never told Wilson. Wilson never voted on the PAC Contract. Wilson never told Schaum about Preston. Schaum never even knew about the employment dispute.

- The uncontested evidence of Record reflects Preston promised Thompson a job back in March of 2008 and identified the job in August of 2008. Moreover, the job identified by Preston proved to be the one Preston endeavored to transfer Thompson into. If all the uncontested facts were known to a reasonable person, the County cannot even prove a violation of the County ordinance which requires a "substantial appearance of impropriety."

- The McAbee Allegations make no sense. The County altogether failed to prove even a hint of an improper act warranting rescission of the Severance Agreement in connection with the McAbee Allegations.

- The Jones Allegations simply fail. The County altogether failed to prove a breach of the Severance Agreement. Moreover, there was no materiality in connection with the breaches alleged.

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against the enforceability of Preston's Severance Agreement as required by the holding in *Baird*.

The allegations of this lawsuit prove more as the byproduct of stubborn Plaintiff than actionable conduct.

In short, the County failed to prove its case. The County had the burden to prove facts supporting its claims. The County cannot take unrelated events from temporally impossible snapshots in time and ask for a verdict in its favor by playing connect the unrelated dots. The Court should end the political vendetta behind this lawsuit and enter a verdict in favor of Preston.

(4) The Doctrine of Unclean Hands Bars Plaintiff's Rescission Remedy.

Invoked by Preston as his fifth affirmative defense in this case, the Doctrine of Unclean Hands bars Anderson County from seeking the equitable remedy of rescission in this case. "An action to rescind a contract is in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (citing *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960)). In turn, "The doctrine of unclean hands precludes a plaintiff from recovering in equity if [it] acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Straight v. Goss*, 383 S.C. 180, 206, 678 S.E.2d 443, 457 (Ct. App. 2009) (quoting *First Union Nat'l Bank of S.C. v. Soden,* 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998)). Here, Anderson County has unclean hands and, therefore, it cannot invoke the Court's equitable powers.

It is axiomatic: "He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Emery v. Smith,* 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct.App.2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). It well understood that unclean hands will preclude rescission of a contract. *See*

Fattorusso v. Urbanowicz, 774 N.Y.S.2d 658, 662 (Sup. Ct. 2004) (holding that where the plaintiff came to court with unclean hands and was not entitled to rescind the purchase of a racehorse); *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App. 1990) (holding that where a plaintiff was found negligent or guilty of wrongful conduct, the plaintiff was precluded from the remedy of rescission).

The requirement that a party seeking the aid of equity, such as rescission, must do so with clean hands is often referred to by the equitable maxim: '[h]e who seeks equity must do equity.'" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) (quoting *Provident Life & Accident Ins. Co. v. Driver,* 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994)). "This principle applies to one who affirmatively seeks equitable relief." *Id.* "In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity." *Id.* Consequently, the Court should refuse the County an equitable remedy where, as here, it lacks clean hands. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants); *Shumaker v. Shumaker,* 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959) ("Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties."); *Anderson v. Purvis,* 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947) (discussing the maxim that he who seeks equity should do equity).

The record proves replete with evidence of the County's unclean hands. An illustrative, but non-exhaustive list, includes the following:

- A series of meetings occurred at Bob Waldrep's office ("Waldrep Meetings") starting in July of 2008 and extending until January of 2009 wherein 2 sitting Council members (Waldrep and C. Wilson) met with three in-coming Council

members (Allen, Moore, and Dunn) to plot the course of Anderson County Council in 2009, including how to get rid of Joey Preston.

- Allen, Moore, and Waldrep all testified that specific County employees were discussed during the Waldrep Meetings.

- Waldrep conceded on the witness stand that the group of employees discussed during the Waldrep meetings have subsequently left County employment.

- Allen, Moore, and Waldrep conceded Preston was discussed during the Waldrep Meetings.

- While outwardly denied by the attendees of the Waldrep meetings, a series of e-mails from Eddie Moore reflect the true intent of the group with regard to Joey Preston. (*See* Def. Ex. 46, 8/14/08 E-mail (Preston "is desperate and just wants to freeze everything so we can't run him off."); Def. Ex. 87, 08/04/08 Moore e-mail to Trammel ("Hopefully we can get [Preston] run out of Anderson County soon..."); Def. Ex. 89, 08/13/06, Stan Welch (reporter) e-mail to Moore ([I]f you can get the witchhunters to understand what should be done, you are the man!"); Def. Ex. 91, 10/20/08 e-mail from Moore to reporter Welch and WAIM radio ("Well, I told radio hog Saturday that they had been trying to get rid of Joey for 10 years and we did by just winning a primary"); *see also* Def. Ex. 20, Bright Notes 10/13/08 ("[H]e's heard her say 'let's fire him.'")

- Brooks Brown testified Tom Allen, current County Council Chairman, told him in July of 2008 (at the Waldrep campaign victory party) that they knew how to get rid of his boy—the group was to give him a command he could not obey and fire him for insubordination. (*See also* Def. Ex. 26, Bright Notes 11/04/08 ("[M]eeting held—they would give him something to do that he could not perform and that he would be fired for insubordination.") Brooks further testified that when Allen learned Brooks had divulged his comments to Preston, Allen threatened him with an investigation. Notably, Allen served as the Chairman of Anderson County's investigative subcommittee and Ms. Wilson also served on the subcommittee. (Allen Dep., 47: 3-25.)

- By contrast, Allen adamantly denied, under oath, ever making such statements to Brooks Brown. (Allen Dep., 82: 6-22 ("That is an out and out lie..").)

- Allen, under oath, also adamantly denied drafting an e-mail on December 24, 2008, attaching a draft agenda of fourteen (14) items, which mirrored exactly what the newly constituted County Council did in its first meeting on January 6, 2009. (*Compare* Def. Ex. 111, 12/24/08 E-mail with attached agenda *with* Def. Ex. 140, 1/6/09 Council Meeting Minutes *with* Allen Dep., 109-114; 119-141 (Testifying e-mail is "100 forgery" and then going through every item on

"forged" agenda and locating them on Meeting Minutes). Importantly, Allen's e-mail was produced from the work e-mail account of Eddie Moore by the Fluor Corporation, from its server, pursuant to a subpoena and was first produced, by Court Order, to counsel for Eddie Moore, before production to Preston. By contrast, Eddie Moore was questioned about the same e-mail. Moore testified he in no way fabricated or manipulated Allen's e-mail stating: "If it come from Fluor Daniel, that the way it come." (Moore Depo., 267: 2-6.)

- Tom Allen also testified that his e-mails could not be recovered because his, "computer blew up..." (Allen Depo., 114: 5-8.)

- Eddie Moore testified that, around the time he received a subpoena for e-mails from his personal computer, his computer was struck by lightening. (Moore Depo., 24: 1-13.) However, Moore also testified all of his e-mails were recovered off the computer. (Moore Depo., 25: 12-23.) According to Moore, his attorney delivered the computer to an IT technician selected by the County. (Moore Depo., 26: 8-21.) Yet, while according to Moore all of his e-mails were recovered and in the County's possession, none were ever produced in response to the subpoena or in response to Preston's discovery requests.

- Eddie Moore testified that the group met at Bob Waldrep's office on the Sunday directly prior to the January 6, 2009 meeting. That meeting would have occurred on January 4, 2009. During the meeting the group discussed agenda items and probably looked at "some of the resolutions." (Moore Depo., 271: 7-25.)

- On October 13, 2008, Cindy Wilson directed the Clerk of Council, Linda Gilstrap, to request Dunn, Allen, Moore, and Waldrep to sign a letter to the McNair law firm requesting the status of bond information. (Ex. 90, 10/13/08 e-mail from Gilstrap to Moore attaching draft letter.)

- On November 17, 2008, Bob Waldrep, Cindy Wilson, Tommy Dunn, Eddie Moore, and Tom Allen sent a letter to Preston directing him to freeze hiring effective immediately. (*See* Ex. 71, 11/17/08 Letter.) While Dunn, Moore, and Allen had not been sworn-in, the correspondence was sent on Anderson County letterhead and copied to: "All Media Outlets." (*Id.*)

- Michael Cunningham testified that Moore asked him, before being sworn into office, whether he would terminate a group of employees if he supplied him with a list of names.

- Michael Cunningham testified he received directives from Moore and C. Wilson which contradicted directives from the then-sitting County Council.

When Cunningham did not follow those directives, Moore later cited the same as an act of insubordination on the part of Cunningham.

- Moore sent correspondence to Preston about a paper shred day for the public on November 13, 2008 at 9:24 AM requesting that Preston "hold off on doing any shredding of any kind of documents from Anderson County at the present time" and "that no financial records be part of this action." (Ex. 92, 11/13/08 Moore e-mail to Preston). However, Exhibit 93 reflects that Moore already knew no County documents would be shredded as of 6:58 AM. Moore blind-copied both Tom Allen and Bob Waldrep on the earlier e-mail to Gail King with Anderson County, which stated: "Thanks for the quick response. We new council members just want to make sure no county documents are destroyed at all before our auditors examine them." As reflected in Preston's response in Exhibit 92, WAIM had been reporting that county documents were being shredded. Exhibit 92, which blind-copies Allen, Waldrep, the Council Clerk, and WAIM radio, reflects a further response from Moore: "Thanks for your quick response...I have always been a no nonsense guy." Then, amazingly, Moore again writes to Rick Driver at WAIM radio, who had been reporting county documents were being shredded when they were not, as had been clarified by Preston, and states; "Rick, keep Preston's response confidential..." So, in essence, Moore sends an e-mail simply to harass Preston and then instructs WAIM to keep Preston's response confidential so the public would remain misled about county documents being shredded.

- Moore repeatedly leaked information to WAIM radio to cause baseless problems for Preston as County Administrator. (*See, e.g.*, Ex. 97, 9/23/08 Moore E-mail to WAIM); Ex. 101, 11/25/08 E-mail blind-copying WAIM radio); Ex. 103, 12/01/08 Moore e-mail blind-copying WAIM radio.

- Before taking office, and before the County ever conducted any investigation, on November 25, 2008, Moore wrote to the Attorney General requesting an investigation of Preston's buyout. (Ex. 101, 11/25/08 Moore e-mail to Attorney General.) Moore copied Tom Allen and Bob Waldrep. Moore blind-copied the County Council clerk, Rick Freemantle, reporter Stan Welch, and WAIM radio. On 12/01/08, reporter Stan Welch wrote to Moore asking if he could run the story for publication. (Ex. 102, 12/01/08 Welch e-mail to Moore.) On 12/01/08, Eddie Moore forwarded the Attorney General's response to his correspondence to Tom Allen and Bob Waldrep. Moore again blind-copied WAIM radio, Rick Freemantle, Jenna Trammel, and reporter Stan Welch. Later on 12/01/08, Moore wrote to Stan Welch stating: "Ask Rusty about it. I have to tread gingerly on this until next week. I don't want to play our hand just quite yet. But if Rusty thinks we need to go public we can." (Ex. 104, 12/01/08 E-mail from Moore to reporter Stan Welch). During his deposition, Moore confirmed Rusty referred to current County Administrator, Rusty Burns. On 12/01/08, reporter Stan Welch wrote to Moore, "I spoke with

Rusty. We agree there is nothing to be lost be running with this story...") (Ex. 105, 12/01/08 Welch e-mail to Moore). So, before the County ever spent the first dime on its multi-million dollar investigation to nowhere, Moore had already begun manipulating the media by leaking "news" about an Attorney General investigation into Preston.

- As noted *supra*, the County produced an e-mail from Heather Simmons Jones dated September 7, 2006, referencing an attached "summary of [the County's employment] offering." (*See* Ex. 63, 9/7/06 E-mail from Jones to Preston.) The summary goes to heart of the issue in dispute with Jones but the County failed to produce it.

- As noted *supra*, both Thompson and Preston testified a Personnel Action Form was executed for Thompson's transfer to the Buyer II position but the County failed to produce it.

- Eddie Moore habitually lied throughout his deposition. (*See* Moore Depo., *passim.*)

- In the fall of 2008, Joey Preston had to sue Bob Waldrep and Cindy Wilson for interfering with his duties as County Administrator. (*See* Ex. 50, 12/29/08 Order Granting Preliminary Injunction.) At the time, both Waldrep and C. Wilson were sitting County Council members. Among a host of other findings, the Court determined: "The County Administrator's duty to supervise his employees is being intentionally and purposefully thwarted by [Waldrep and C. Wlson]. (Ex. 50, ¶27.) And: "The actions of [Waldrep and C. Wilson] have interfered with the County Administrator's ability to do his job." (Ex. 50, ¶29.) Finding Preston was likely to win on the merits of his suit, the Court issued a preliminary injunction against Waldrep and C. Wilson. (Ex. 50.) At trial, Waldrep testified that he was acting in his official capacity in relation to the acts the Court found interfered with Preston's job as County Administrator. For this reason, the County later paid his attorney's fees. Cindy Wilson confirmed this was consistent with her recollection. (Wilson Depo., 68: 2-15.)

- Gracie Floyd testified that Cindy Wilson used information requests as a club to harass Preston, over and over again. Indeed, Defense Exhibit 34, which is an opinion from the Supreme Court of South Carolina confirms this tactic. As of 2005, Wilson had already requested over 59,000 pages of documents from Preston. (Ex. 34, p. 5, 2008 Opinion of *Wilson v. Preston.*) Thereafter, the information requests never ceased.

Accordingly, the evidence of record firmly establishes that the County, by and through its Council members and Council members elect, engaged in a pattern of conduct intended to

harass and interfere with Preston's duties as County Administrator. Regrettably, such conduct has also spilled over into the instant lawsuit. The County lacks clean hands in this case and cannot invoke the Court's equitable powers to rescind the Severance Agreement, even if it could otherwise supply a basis for doing so, which it cannot. *See Straight v. Goss*, 383 S.C. 180, 206, 678 S.E.2d 443, 457 (Ct. App. 2009).

(5) <u>As to the First Cause of Action</u>: The County's Claim Fails for Several Reasons.

The County's claims under state and local laws fail for the following reasons:

(a) The first cause of action is facially defective:

As alleged, the first cause of action fails to state a claim. The claim fails to specify how any of the alleged facts violate any specific provision of either the S.C. Ethics, Government Accountability, and Campaign Reform Act of 1991 or any local code provision.

(b) No evidence supports a violation of state or local laws:

As indicated above, none of the Council members in question gained a benefit by voting in favor of Preston's Severance Agreement. No evidence of fraud exists. No evidence of *quid pro quo* exists. No evidence demonstrates a substantial appearance of impropriety. Accordingly, the County cannot demonstrate a violation of any state or local law.

(c) South Carolina Code §§8-13-100 *et seq.* does not create a private right of action.

Throughout the Amended Complaint, the County cites the Ethics Act to support a private right of action against Preston. But no private right of action exists under the Ethics Act. "In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007). "[A] statute which does not purport to establish civil liability, but merely makes provision to secure the safety or welfare of the public as an entity[,] is not subject to a construction establishing a civil liability." *Doe*,

373 S.C. at 396, 645 S.E.2d at 248 (quoting *Dorman v. Aiken Comms., Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (internal quotations omitted)). This analysis applies here.

The Ethics Act does contain enforcement mechanisms, just not a private right of action.[22] For example, after an administrative process, the State Ethics Commission can file a claim in the Court of Common Pleas. S.C. CODE § 8-13-320. The Ethics Act similarly provides for "forfeiture of gifts, receipts, or profits, or the value thereof..." S.C. CODE § 8-13-320(l)(ii). Indeed, the Ethics Act establishes a sophisticated enforcement scheme requiring the confidentiality of complaints, providing for discovery, and a hearing process governed by the Administrative Procedures Act. *See* S.C. CODE § 8-13-320(j). But nowhere does the Ethics Act confer the right to private enforcement outside of the APA process.

The Ethics Act does not create an exclusive remedy for the conduct prohibited therein. S.C. CODE § 8-13-780. But the Ethics Act likewise does not create a new right of action. The statute instead limits its recovery mechanism to actions brought by the Attorney General. *See* S.C. CODE § 8-13-780 (C) ("The value of anything received...in breach of the ethical standards of this chapter...is recoverable [by public entities] in an action by the Attorney General." Had the General Assembly wished to create a "private" attorney general provision, with enforcement by citizens or other public entities, the Act would so state but it does not. *Compare* S.C. CODE § 8-13-780 *with* S.C. CODE § 39-5-140 (expressly creating a private cause of action). Notably, here, the County does not bottom its claim on purported declaratory relief, as possibly permitted by

[22] The statute does permit recovery on the part of a party suffering a loss due to its violation but only after the Ethics Commission makes a determination of such violation and presents the same to the Circuit Court. S.C. CODE § 8-13-320(14). The Attorney General can also pursue claims on behalf of parties sustaining losses.

statute, but rather on the State Ethics Act itself. However, no remedy exists under the State Ethics Act. [23]

In *Baird*, the Plaintiff sought prospective relief enjoining the issuance of the bond in question relative to a conflict the State Ethics Commission had already opined as problematic. Here, the County seeks to invoke the State Ethics Act without any involvement of the State Ethics Commission to undo an action occurring nearly four years ago. No authority supports such relief.

(d) No violation of the Anderson County Ordinances can be sustained.

As discussed *supra*, no evidence supports a finding that a violation of the Anderson County Ordinances occurred. Likewise, no provision in the Anderson County Ordinances provides for the rescission of a contract in instances when one or two elected officials violate the Anderson County Code.

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[23] With respect to the Schaum Allegations, the issue becomes particularly stark. Even if, the vote could be somehow construed to relate to Schaum's amended contract, which it clearly did not, as the County knows, the Ethics Act would not even then disqualify Wilson from voting on the same. The South Carolina Ethics Act only prohibits public officials from voting on issues which affect "an economic interest in himself or a member of his immediate family." S.C. CODE § 8-13-700(B)(4). Under the statute, Schaum no longer qualifies as an immediate family member, as she was not: (a) a child residing in Wilson's home; (b) Wilson's spouse; or (c) an individual claimed by Wilson as a dependent for tax purposes. S.C. CODE § 8-13-100(18).

The South Carolina State Ethics Commission addressed this exact issue in Written Opinion SEC AO92-214 issued June 9, 1992. In that opinion, the Ethics Commission examined the propriety of a City Council member voting on whether the City should execute a contract with a company owned in part by the Council member's son. The Commission concluded: "From the facts submitted, and by virtue of the definitions contained in the statute, the Council member does not have an economic interest, since his son is not a member of his immediate family. Therefore, he would not be prohibited from participation in deliberations and votes on the sewer project contract." *Id.* at 2. For these reasons alone, the Court should enter a verdict against the County on the Schaum allegations, as they relate to the State Ethics Act.

(6) <u>As to the Second Cause of Action</u>: Rescission Based Upon Public Policy.

Plaintiff's second cause of action fails to state a claim. Plaintiff merely alleges: "The Severance Agreement is void for being contrary to the public policy of South Carolina and Anderson County." (Am. Compl., ¶38.) The claim fails to state what public policies Plaintiff contends were violated, by whom, and how. The claim proves equally as deficient as if the County had alleged: *the Severance Agreement violated federal law.* Relief cannot be granted based upon the same, as the Court cannot find a contract violates public policy, unless it can ascertain what public policy the County contends as violated. Moreover, no evidence supports a violation of any public policy. Accordingly, the Court should enter a verdict in Preston's favor as to the second cause of action.

(7) <u>As to the Third Cause of Action</u>: Plaintiff's Claim for Breach of Fiduciary Duty Fails.

First, no facts under the Thompson, Schaum, or McAbee Allegations support a claim for breach of fiduciary duty on the part of Preston.[24] As stated above, the County has failed to prove how such facts bear any relationship to the Severance Agreement whatsoever. Accordingly, the County failed to prove any element of Plaintiff's Third Cause of Action.

Second, under South Carolina law, breach of fiduciary duty constitutes a legal claim. *See Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000) (Breach of fiduciary duty is "an action at law.") By contrast, "An action to rescind a contract is in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (citing *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). Like a pair of mismatched socks, Plaintiff's

[24] Most claims such as the third cause of action do no allege the Jones Allegations in support thereof.

Amended Complaint impermissibly links a legal claim with an equitable remedy. Accordingly, the Court should find in favor of Preston as to the third cause of action.

(8) <u>As to the Fourth Cause of Action</u>: Plaintiff's Claim for Fraud Fails.

First, no evidence of record relating to the Thompson, Schaum, or the McAbee Allegations supports Plaintiff's fourth cause of action for fraud. The County has utterly failed to sustain its burden of proof as to the Fourth Cause of Action.

Second, to establish a cause of action for fraud, the County must prove by clear, cogent, and convincing evidence nine (9) elements. They are: (1) A representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance of its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Kahn Construction Co. v. S.C. Nat'l. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). The County failed to establish any of the elements of fraud by a preponderance of the evidence, let alone clear and convincing evidence. Judgment should be entered in Preston's favor as to the County's fraud claim.

(9) <u>As to the Fifth Cause of Action</u>: Plaintiff's Claim for Constructive Fraud Fails.

First, no evidence relating to the Thompson, Schaum, or McAbee Allegations support Plaintiff's fifth cause of action for constructive fraud. No evidence supports any wrongdoing on the part of Preston, let alone by clear and convincing evidence.

Second, to sustain a claim for constructive fraud, the County must prove nine elements. They include: (1) a representation; (2) falsity; (3) the speaker ought to have known the falsity; (4) materiality; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the

hearer's consequent and proximate injury. *See Woods v. State,* 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993). As discussed fully *supra*, the County utterly failed to establish any of the elements of constructive fraud.

Like actual fraud, Plaintiff must prove constructive fraud by clear, cogent, and convincing evidence. *See e.g., Baptist Foundation for Christian Education v. Baptist College*, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984) (claims for constructive and actual fraud failed because they were unsupported by clear, cogent, and convincing proof).

(10) <u>As to the Sixth Cause of Action</u>: Plaintiff's Claim for Negligent Misrepresentation Fails.

First, Plaintiff failed to introduce any evidence relating to the Thompson, Schaum, or McAbee Allegations to support Plaintiff's sixth cause of action for negligent misrepresentation. To support a claim for negligent misrepresentation, the County must prove six (6) elements. They include: (1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the Plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847, 852 (Ct.App. 1997). Moreover, to the extent the Plaintiff contends a mistake on its part, arising from alleged negligent misrepresentation occurred, the County must prove such claims by clear, cogent, and convincing evidence. *See Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1987).

Here, the County failed to prove the elements of negligent misrepresentation. As noted *supra*, none of the facts for Jones, Schaum, Thompson, or McAbee fit into the elements of

negligent misrepresentation. Accordingly, the Court should enter a verdict in favor of Preston as to the County's sixth cause of action.

The County's negligent misrepresentation claim also warrants immediate dismissal under the South Carolina Tort Claims Act ("SCTCA").[25] The SCTCA "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. CODE § 15-78-70(a). In relation to the negligent misrepresentation claim, all allegations against Preston fall beneath the scope of his official duties while acting as County Administrator. The Complaint states as follows:

> "Preston had a duty to inform Anderson County and Anderson County Council, as set out above, concerning his actions related to Mr. Thompson and Mr. Wilson to correct the false statement made by Mr. Thompson and a duty to inform Anderson County and Anderson County Council concerning the violations of law, set out above, which he had caused to occur."

Because the claim's allegations only relate to acts within Preston's official duties, Plaintiff's negligent misrepresentation claim against Preston warrants immediate dismissal under the SCTCA.[26]

S.C. CODE § §15-78-70(c) mandates the substitution of Anderson County for Preston. The statutory provision states:

> On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.

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[25] Preston also notes that the County impermissibly seeks an equitable remedy for a legal claim.

[26] The County cannot escape the fact that Preston acted in his official capacity, as the County bottoms its misguided breach of fiduciary duty claim based upon Preston's position as County Administrator.

The South Carolina Court of Appeals analyzed §15-78-70(c) in the decision of *Flateau v. Harrelson*, 355 S.C. 197, 208, 584 S.E.2d 413, 417 (Ct. App. 2004). The *Flateau* Court ruled:

> Because we have concluded that the causes of action alleged by Flateau and Fielding against the Board members constituted conduct within the scope of the Board members' official duty, there can be no liability of individual members of the South Carolina Commission for the Blind. The statutory dialectic reveals that a governmental employee acting within the scope of official duty is exempt from personal liability.
>
> The contentions of Flateau and Fielding fly in the face of logical argumentation in that the efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties. The remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual government employee.

Id. at 206, 584 S.E.2d at 417. Since the allegations against Preston in the negligent misrepresentation claim solely relate to his official duties, S.C. CODE §15-78-70, as well as the holding in *Flateau*, requires the County to dismiss its claim, as the County has effectively and legally sued itself.

(11) <u>As to the Seventh Cause of Action</u>: the Severance Agreement was not Arbitrary or Capricious.

The County's claim that the Severance Agreement warrants rescission because it was arbitrary and capricious lacks both legal and factual merit. First, from a legal standpoint, the County cannot collaterally impeach the vote of a constituted body by interrogating individual Council members. In *Bear Enterprises v. County of Greenville*, the South Carolina Supreme Court held:

> We note that Bear deposed County Council members and presented their testimony in support of Bear's argument that Council's decision was arbitrary. We are aware of no authority allowing someone challenging action by Council to interrogate members individually. To impeach Council's decision, the governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of

> debate and compromise. If individuals are not satisfied with decisions made by members of the municipal government within the limits of the law, their remedy is at the polls, not the Courts.

319 S.C. at 139 n.1, 459 S.E.2d at 885 n.1. Just like in *Bear*, Plaintiff attempts to interrogate individual Council members to establish the vote as arbitrary and capricious. Just like in *Bear*, then, the Court should not consider any such challenges and enter a verdict in Preston's favor.

Quite simply, *Bear* stands for the proposition that: "[i]t is not the prerogative of the courts to pass upon the wisdom of County Council's decision . . . " *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995). "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster Cnty.*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). Importantly, "The decision of the legislative body is presumptively valid and the [opposing party] has the burden of proving otherwise." *Bear Enters.*, 319 S.C. at 141, 459 S.E.2d at 885 (citing *Lenardis v. City of Greenville*, 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct. App. 1994)).

Plaintiff must prove the arbitrariness of the County's action "by clear and convincing evidence." *Id.* at 141, 459 S.E.2d at 886 (citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991)). "If the propriety of the Council's decision is even 'fairly debatable,' [the court] cannot inject [its] judgment into a review of [the Council's] decision, but must leave that decision undisturbed." *Id.* at 140, 459 S.E.2d at 885 (citing *Lenardis*, 316 S.C. at 472, 450 S.E.2d at 598) (holding the county's decision in refusing to rezone an area was not arbitrary or capricious). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985)

(citations omitted) (holding that the Board's decision to suspend a dentist's license for five years was within its authority and not arbitrary or capricious). Thus, in the instant case, the County had the burden of showing by clear and convincing evidence that the county council's decision was not "fairly debatable" and that the council abused its discretion in approving an arbitrary and capricious Severance Agreement.

Ample evidence demonstrates Anderson County Council did not act arbitrarily or capriciously when it voted to approve the Severance Agreement. Such evidence includes:

Michael Thompson:

- Michael Thompson testified that there were actual instances of economic development being threatened by the political infighting and he did not believe it was in the County's best interest to go through a drawn out litigation process with Mr. Preston.

  (Thompson Depo., 150:6-21.)

- Thompson also testified that he did not believe the County's best interests would be served by spending the then two million dollars investigating and pursuing Mr. Preston.

  (Thompson Depo., 150:23-25; 151:1-5.)

Larry Greer:

- Greer testified that the political infighting impaired the County's ability to conduct business and he voted for the Severance Agreement in hopes it would end.

- Greer testified Tom Bright informed him if the County lost the lawsuit, exposure could exceed two million dollars ($2,000,000.00).

- Greer testified the voters were sick of the political infighting.

- Greer testified the political infighting threatened economic development in Anderson County.

- Greer testified that upon the arrival of the incoming County Council, Preston's anticipatory breach claim would ripen into a liability for the County, which he sought to avoid.

- Greer testified that he voted in favor of the Severance Agreement, in part, because it was about a million dollars ($1,000,000.00) less than the worst case scenario articulated by Bright.

- Greer testified their analysis proved correct as the County has currently spent somewhere around $2.5 Million Dollars pursuing Preston.

- Greer testified he spent an inordinate amount of time thinking and praying over his decision.

- Greer also testified that he believed it was important to treat the County Administrator fairly so as not to impair the County's ability to find another Administrator in the future.

- Greer also testified that he did not fully accredit Bright's advice because of an unfavorable outcome in previous representation and also because he did not seem to understand the legal issue.

Gracie Floyd:

- Floyd testified that she believed the County faced over two million dollars ($2,000,000.00) in liability if it lost to Preston.

- Floyd testified that she believed the political infighting interfered with completing the County's business and she hoped the Severance Agreement would end it.

- Floyd testified it was important her to be honest and fair and she felt voting in favor of Joey's Severance Agreement was both honest and fair.

- Floyd testified that Preston had worked hard for the County and it was important to treat him fairly.

- Floyd also testified that she had no doubt that incoming Council intended to treat Preston unfairly. She testified that Preston's claims, in her view, would ripen into liability in January of 2009 and she felt it was her duty to vote in a manner which foreclosed such a deleterious outcome. According to Floyd, the Council frequently acted in a prospective manner.

Bill McAbee

- McAbee testified that Bright informed him that if the County lost a dispute with Preston, it could have been in excess of two million dollars.

- McAbee testified he also voted in favor of the Severance Agreement because it would put the "whole contentious period behind" them, which had already lasted several years.

- McAbee testified the contentiousness was deleterious to Anderson County and it created ongoing problems.

- McAbee also testified that he did not fully accredit Bright's advice because of an adverse outcome in a previous dispute where Bright advised the Council that it had strong defenses.

The evidence of record does not support a finding that the Severance Agreement vote was arbitrary and capricious. Each former council member who voted in favor of the Severance Agreement articulated reasonable and intelligent explanations why they voted in favor of the same. Such reasons are "fairly debatable" and cannot be upset by the Court. Thus, the Court should enter a verdict in Preston's favor as to the tenth cause of action.

The County appears to suggest two reasons exist why the vote in favor of the Severance Agreement proves arbitrary and capricious. First, the County argues the Council members disregarded Bright's advice that Preston's Master Employment Agreement was possibly unenforceable. Second, the County argues the severance amount exceeds what was

contemplated by the Master Employment Agreement. The evidence at trial upsets both arguments.

Initially, when questioned, Bright identified the decision of *Cowart v. Poore* as the source of his reservations about the enforceability of Preston's Master Employment Agreement.[27] However, Bright could not articulate how the exception identified in *Cowart v. Poore* applied or did not apply. This proves especially troubling in light of the fact that counsel for Preston raised the exception from the *Cowart* opinion on two separate occasions in correspondence. (*See* Ex. 33, Attach. 5 & 6 (Noting specific enabling statute applies to Administrators allowing for contracts of definite term).) Such testimony confirms the legitimacy of both McAbee's and Greer's concerns. Notably, Wilson likewise referred to the same during video of the County Council meeting played by the Plaintiff.

Secondly, Bright conceded he conducted no factual investigation into the merits of Preston's claims. He had not reviewed the pleadings of the lawsuit Preston filed against C. Wilson and Waldrep. Bright similarly conceded that correspondence from Preston's counsel from October 23, 2008 specifically stated Preston's claims exceeded the four corners of the Master Employment Agreement and included tort claims against C. Wilson and Waldrep. (*See* Pl. Ex. 22.) In providing a written evaluation to the Personnel Committee, Bright admitted he provided no analysis of likely tort liability, as a factual investigation would have to be completed

[27] It is also noteworthy that the County suggests that execution of the Severance Agreement does not constitute a governmental/legislative action on the part of the County. Indeed, the basis of the *Cowart* decision, upon which Bright relies, establishes that the hiring and firing of a County Administrator is, in fact, a governmental/legislative decision. Moreover, Bright's notes even reflect the same. (*See* Ex. 28, p. 2, §III(A)(2).) The fact is further bolstered by a specific enabling statute conferring such legislative power. *See* S.C. Code §4-9-620. Accordingly, contrary to the County's conclusion, the termination of Preston's employment involves a governmental/legislative function implicating the protections of the Enrolled Bill Doctrine as articulated in the *Bear Enterprises* decision. *See supra.*

to do so and he did not complete one. (*See also* Def. Ex. 28, Bright's Evaluation to Personnel Committee.) Moreover, Bright also conceded that his analysis to the Personnel Committee included a host of potential options and one such option included settling with Preston. (*See* Def. Ex. 28, p. 4, ¶F.)[28]

The County also called Dr. Alford to testify regarding the mechanical calculation of the buyout amount under the Master Employment Agreement. Dr. Alford readily testified that he understood Preston's claims included tort claims and exceeded the four corners of the Master Employment Agreement. Dr. Alford also testified that the release in the Severance Agreement exceeded the breadth of that required by the Master Employment Agreement's termination without cause provision. Dr. Alford conceded the value of a release is dictated by its scope and a broader release would prove more valuable.

Dr. Alford also acknowledged that the Master Employment Agreement contained an indemnity provision which was intended to survive the termination of the Master Employment Agreement. According to Dr. Alford, such provision possessed economic value. Upon execution of the Severance Agreement, however, Preston gave up such provision and thus gave up more than the buyout provision in the Master Employment Agreement contemplated. Thus, each of the arguments advanced by the County fails to establish the County Council members who voted in favor of the Severance Agreement acted in arbitrary and capricious manner. And, by no means, has the County come anywhere close to establishing such by clear and convincing evidence. The Court should enter judgment in Preston's favor as to the seventh cause of action.

[28] In somewhat bizarre testimony, Bright indicated that he was alarmed that Finance Director Gina Humphreys had been invited to a negotiation session between the Parties. When questioned, however, Bright admitted he had no idea how any of the buyout calculations had been completed and the only such person who did was Humphreys.

(12) <u>As to the Eighth Cause of Action</u>: the County's Allegations of a Fundamental Breach of Contract Fail.

The County predicates its eighth cause of action for rescission on the Jones Allegations. As noted above, Jones testified she gained no new benefit from either of the memoranda (i.e., vehicle use or continuing learning). Such memoranda were intended to replace missing documents from Jones' personnel file that she desired to clean-up before Preston left the County. No dispute exists that Jones, as an Economic Development Director, always had a vehicle and continued to have one after Preston left. Similarly, no dispute exists that Jones never pursued any continuing learning credits while working for the County. And Jones never traveled to Germany, as contemplated the Travel Memo, which Preston never signed.[29] Even if the County's allegations proved true, which they are not, the County sustained no detriment from the same. Finally, no evidence even establishes Preston executed the memoranda on December 1, 2008. The documentary evidence and Preston's testimony actually prove the opposite.

Based upon the evidence of record, the Jones Allegations fail, as a matter of law, to support a claim of rescission. (*See* Compl., ¶¶71-76.) It is axiomatic: "Before one party's partial failure of performance will give the other the right of rescission, the act failed to be performed must go to the root of the contract or defeat the objects of the contract" (i.e., fraud in the inducement or mutual mistake). 17A AM. JUR.2D, *Contracts*, § 562 (2009). South Carolina follows this rule. *See Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).[30] To the extent supported by the Jones Allegations, the County's claims for rescission

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[29] As noted *supra*, the County failed to prove the Travel Memo, which was never executed, would have violated the Severance Agreement, as Preston was intended to assist Cunningham with his duties.

[30] *See also* "The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract." *Id.* (citing

warrant immediate dismissal as they fail to defeat the "root" of the Severance Agreement, even if they were not false.

As with all contract interpretation, determination of the Severance Agreement's "root" constitutes an issue of law for the Court. *See U.S. Bank Trust Nat. Ass'n. v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009). The Parties satisfied all material terms of the contract. Even if the County had proved the alleged breach, which it did not, "Where [as here] the [alleged] breach is not so material as to defeat the purpose of the contract, the non-breaching party is compensated by damages", **not rescission.** *Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 620 (Ct. App. 1994).

(13) <u>As to the Ninth Cause of Action</u>: the County's Claim for Breach of Fiduciary Duty Fails.

As an initial matter, the County likewise bottoms the ninth cause of action for breach of fiduciary duty on the Jones Allegations. For the same reasons Plaintiff's claims for contractual breaches fail under the Jones Allegations, the County's claim for breach of fiduciary duty also fails.

Moreover, as stated *supra*, under South Carolina law, breach of fiduciary duty constitutes a legal claim. *See Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000) (Breach of fiduciary duty is "an action at law.") By contrast, "An action to rescind a contract is

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Smith v. First Provident Corp., 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965); *Davis*, 237 S.C. at 99, 115 S.E.2d at 654; *Martin v. Carolina Water Serv., Inc.*, 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984)). Accordingly, a rescission will not be granted "for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." *Brazell v. Windson*, 384 S.C. 512, 517, 682 S.E.2d 824, 826 (2009) (citing *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143–44, 382 S.E.2d 915, 917 (1989)). "Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient." 26 WILLISTON ON CONTRACTS § 68:21 (4th ed. 1999 & Supp. 2012) (instructing that the breach must be "of a most substantial character and pervade[ ] almost the entire contract" such that the breach would "defeat its purpose in nearly every essential respect").

in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (citing *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). Plaintiff's Amended Complaint impermissibly mismatches a legal claim with an equitable remedy. Accordingly, the Court should find in favor of Preston as to the Seventh Cause of Action.

(14) <u>As to the Tenth Cause of Action</u>: Plaintiff's Claim for Constructive Trust Fails.

No evidence of record supports the elements required for a constructive trust. Plaintiff was required, but did not, prove the elements of constructive trust by clear and convincing evidence. *See McNair v. Rainsford,* 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Because the County failed to prove its case even by a preponderance of evidence, the Court should enter judgment in Preston's favor as to the Tenth Cause of Action.

(15) <u>As to the Eleventh Cause of Action</u>, Plaintiff's claim for Unjust Enrichment fails.

A claim for unjust enrichment includes three (3) elements. They include: (1) a benefit conferred upon the defendant by the Plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust to retain it without paying its value. Plaintiff failed to prove the elements of its Eleventh Cause of Action.

Plaintiff's unjust enrichment claim makes no sense under the instant facts. Preston and the County executed a Severance Agreement—a contract. That contract must be either: valid or invalid. While Preston adamantly contends no basis exists to rescind the contract, in any event, a claim for *quantum meruit* would not provide grounds for rescission, as a contract with negotiated terms exists. *Quantum meruit* could only prove relevant if the Severance were first invalidated on some other ground. Stated differently, *quantum meruit* does not support the remedy of rescission.

No evidence supports a finding of unjust enrichment. In exchange for the Severance Agreement, Preston left his job as County Administrator and granted a release and covenant not to sue. The County provided a larger severance amount than calculated under the Master Employment Agreement, but Preston also gave up more than was required by the Master Employment Agreement and settled his tort causes of action as well. Thust, the Severance Agreement payment constituted appopriate reciprocal consideration. *Quantum meruit* does not create a vehicle to recoup a contract benefit—after the fact—if a party no longer views the exchange of consideration as desirable.

B. The County's Remaining Arguments Likewise Lack Merit.

The County has raised two additional grounds, which similarly have no merit. They are:

1. One Bad Apple Taints the Barrel and the holding in *Thompson v. City of Atlantic City*.

The County has repeatedly attempted to salvage its weak claims by citing the holding of *Thompson v. City of Atlantic City*, 921 F.2d 427, 190 N.J. 359 (2007). Contrary to what the County might argue, the *Thompson* opinion has nothing to do with the case at bar, nor does its facts even vaguely resemble this case.

Thompson involved an individual (Tracy Thompson) who sued the City of Atlantic City pursuant to 42 U.S.C. § 1983. Before the lawsuit ended, Thompson ran and won the Atlantic City mayoral race. *Id.* at 431. Thompson's election created conflict issues peculiar to New Jersey municipal and ethics law due to the pending lawsuit filed by Thompson.

New Jersey's Faulkner Act vested Thompson as mayor with "executive functions" and the City Council with "legislative functions." *Id.* at 436; *see also* N.J.S.A. 40:69A-32-(a). "Among the mayor's executive functions is the authority to negotiate and sign all contracts for the municipality." *Id.* "Because a 'settlement agreement between parties to a lawsuit is a

contract [ ], when a municipality is involved in litigation, it necessarily falls within the mayor's purview to decide whether to enter into a settlement and, if so, to negotiate the terms of that settlement." *Id.* In *Thompson*, the New Jersey Supreme Court examined the findings of both the trial and lower appellate courts where they found: "that the Faulkner Act 'neither contemplates nor provides for a process for a mayor to settle litigation during his term of office, in which he is the plaintiff suing the City." *Id.* at 434. Thompson's analysis simply has nothing to do with the case *sub judice*.

The County has previously argued that *Thompson* stood for the proposition that "one bad apple spoils the barrel." Yet, **not one** word of the *Thompson* opinion addresses: vote counting, treatment of individual votes, disqualifying individual votes versus disqualifying the total vote. The County simply misapprehends *Thompson's* holding. The fundamental reason the contract in *Thompson* was rescinded was because, due to the Faulkner Act, the entire settlement negotiation occurred between Thompson and his underlings.

Thompson has no application to the instant facts. *Thompson* does not involve the treatment of votes when allegations of an interested transaction exist. *Thompson* instead examines a unique legal issue under New Jersey's Faulkner Act, which is wholly different from South Carolina law. Specifically, *Thompson* involves conflict issues arising from a mayor's relationship to a city when that mayor has existing litigation against the city. *Thompson* does not involve South Carolina law. *Thompson* does not involve a County. *Thompson* does not involve a County under South Carolina law. *Thompson* does not involve a Severance Agreement. *Thompson* has no similarities to the case at bar. And, contrary to the County's likely stated holding, *Thompson* does not stand for the proposition that one bad apple spoils the barrel. The Court should find in favor of Preston.

2. The County's Unpled Parliamentary Attacks Lack Merit.

The County knows it cannot defeat the actual majority vote on the Severance Agreement. So, the County attempts to "move the target," by asking the Court to undo an earlier parliamentary vote to call the question (end debate) which carried 4 to 3. *See* County Motion for S.J., p. 3. This argument fails for 3 reasons.

First, both Waldrep's and Wilson's votes must be disqualified. Upon doing so, none of the underlying parliamentary votes, including the vote to call the question, would fail. Accordingly, the County's objections in this regard have no merit.

Second, in the County's own words, "[I]t would not be appropriate for the Court to sit as, in effect, a parliamentarian for the County Council..." *Bradshaw et al. v. Anderson County*, C.A. No. 2009-CP-04-00491 (Anderson Ct. Comm. Pl. Mar. 26, 2009). This is true because, even if everything the County contends were true, parliamentary defects do not invalidate substantive action. The majority rule is:

> The action of municipal bodies exercising legislative functions should not be overthrown upon technical rules or strict construction of parliamentary law.... Mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members has agreed to the particular measure. Hence, where an ordinance is enacted in compliance with the charter, it will not be invalidated because in its passage one of the parliamentary rules of the council was violated.

4 McQuillin, THE LAW OF MUN. CORP. § 13.42.10 (3d Ed. 2009). Thus, "courts ordinarily will not annul or invalidate an ordinance enacted in disregard of parliamentary rule, provided the enactment is made in the manner required by statute. **The rules of parliamentary practice are merely procedural, and not substantive.**" *City of Pasadena v. Paine*, 126 Cal. App. 2d 93, 271 P.2d 577 (Cal. App. 2 Dist. 1954) (emphasis added); *Gardner v. U.S.W.A. Intern. Union*, 42 Pa. D. & C.3d 318, 1986 WL 3372 (Pa. Com. Pl. 1986); *South Georgia Power Co. v. Baumann*, 169

Ga. 649, 151 S.E. 513 (1929); *Savarese v. Buckeye Local School Dist. Bd. of Educ.*, No. 94-J-30, 1995 WL 138925 at *1, *2 (Ohio App. 7 Dist. Mar. 21, 1995); *Winninger v. City of Waupun*, 183 Wis. 32, 197 N.W. 249 (1924). The substantive action of County Council was the approval of the Severance Agreement. The 4 to 3 vote to call the question merely constitutes a parliamentary mechanism, not regulated by statute and with no operative effect.

South Carolina courts have adopted this majority position. *Smith v. Jennings*, 67 S.C. 324, ___, 45 S.E. 821, 822-23 (1903) ("[I]t is not a judicial question whether the Senate had the right to reconsider the vote upon such reconsideration. That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself."); *South Carolina Public Interest Foundation v. the Judicial Merit Selection Commission*, 369 S.C. 139, 632 S.E.2d 277 (2006) (finding that coequal branches of government should not sit in judge of each others internal actions.) Indeed, Anderson County does regulate such parliamentary issues itself. Under Anderson County Code § 2-37(g), any member may appeal "to the county council from the decision of the chairperson" in relation to questions of order. Here, no appeal was made by any council member. (*See* Anderson County Code § 2-37(g).) Thus, the Court should follow applicable authority and refrain from sitting as judicial parliamentarian over Anderson County Council, consistent with the very position the County advocated in March of 2009. *See Order from Bradshaw et al. v. Anderson County*, C.A. No. 2009-CP-04-00491 (Anderson Ct. Comm. Pl. Mar. 26, 2009).

Third, the County argues as if the vote to call the question had been different, a different outcome would result. Simply no evidence exists to support this contention. At the time the 4 to 3 vote occurred, County Council had already voted in favor of the Severance Agreement by a prior vote of 5 to 2. Moreover, under Robert's Rules of Order, the time for debate would

eventually expire automatically causing the vote to occur regardless. (*See* Robert's Rules of Order Art. 1, § 7.)) The 6 to 1 vote approving the Severance Agreement would have occurred regardless of the 4 to 3 vote. Thus, even if the County had pled its current theory of the case, and even if South Carolina law allowed judges to serve as parliamentarians, the vote over which the County now cries foul did not impact the outcome. The County's willingness to stretch so far only evidences the legal deficiencies of its case. The Court should enter judgment in Preston's favor.

III. THE COURT SHOULD ENTER JUDGMENT IN PRESTON'S FAVOR AS TO HIS COUNTERCLAIM FOR BREACH OF CONTRACT.

The Court should enter judgment in Preston's favor in relation to his counterclaim for breach of contract. In exchange for a similar but broader reciprocal provision from Preston, the County agreed as follows:

> 8. The County agrees and hereby covenants irrevocably never to make any claim or demand, or to commence, cause or permit to be instituted or prosecuted, any claim, charge, proceeding or action at law or in equity against Mr. Preston, his heirs, legal representatives, or assigns, by reason of any claim, demand or cause of action which the County may now have, or may hereinafter acquire, relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County, expressly including, but not limited to, all actions taken by Mr. Preston within the scope and course of his employment as County Administrator.

(Pl. Ex. 7, Severance Agreement, ¶8.) Simultaneously, Paragraph 6 of the Severance Agreement states in material part:

> The parties expressly covenant for themselves, their legal representatives, their heirs, and assigns, that this Agreement may be treated as a complete defense to any legal, equitable, or administrative action that may be brought, instituted, or taken by Employee against the County, related to Employee's employment, and/or the termination of his employment, or the conditions of his employment, and shall forever be a complete bar to the commencement or prosecution of any action,

> suit, charge, claim, or legal proceeding relating in any way to Employee's employment or termination of employment.

(Pl. Ex. 7, Severance Agreement, ¶6.) Here, the County instituted an action in equity against Preston wherein it made eleven claims for rescission. To support those claims, the County alleged the Jones Allegations, the Thompson allegations, the Schaum Allegations, and the McAbee Allegations. Accordingly, the County breached the Severance Agreement by filing the instant lawsuit.

Each and every nuclei of allegations arises out of the scope and course of Preston's employment as County Administrator. The Jones Allegations, for example, relate to alleged back-dating of the SUV Memo, Education Memo, and Travel Memo. The Thompson Allegations relate to a promise of employment made to Thompson, while Preston served as County Administrator. The Schaum Allegations relate to two contracts executed while Preston served as County Administrator. The McAbee Allegations relate to a commission obtained by McAbee and travel reimbursements received while Preston served as County Administrator. As a consequence, no doubt exists that Plaintiff breached the covenant not to sue set forth in Paragraph 8 of the Severance Agreement.

The institution of the instant lawsuit constitutes an obvious breach of the Severance Agreement's covenant not to sue provisions. Numerous Courts examining the issue have ruled that obvious breaches of covenants not to sue support the award of damages in the amount of attorney's fees incurred as a result of the breach. *See S&D Mech. Contractors, Inc. v. Enting Water Conditioning Systems, Inc.*, 71 Ohio App.3d 228, 241, 593 N.E.2d 354, 363 (Ohio Ct. App. 1991); *Anchor Motor Freight, Inc. v. Int'l Bd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F. Supp. 2d 579, 592 (S.D. Tex. 2011). *See,*

e.g., *Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302, 1306 (5th Cir.1992) (holding that where an action is brought in obvious breach of covenant not to sue, court has wide discretion to impose liability for litigation expenses, including attorney's fees); *McKissick v. Gemstar-TV Guide Int'l, Inc.*, Ca. No. 04-262, 2006 WL 211950, at *2 (N.D. Okla. Jan. 27, 2006) (granting summary judgment in favor of defendant where plaintiff's suit was "in violation of a broad and unambiguous covenant not to sue"), *aff'd in part, vacated in part on other grounds, and remanded,* 618 F.3d 1177 (10th Cir.2010); *Cefali v. Buffalo Brass Co., Inc.*, Ca. No. 87-102L, 1990 U.S. Dist. LEXIS 13881, at *50–*51 (W.D.N.Y. Sept. 24, 1990) (holding party is entitled to attorney's fees for "suits brought in obvious breach or otherwise in bad faith" where plaintiffs' allegations arose directly from events surrounding the settlement agreement and were in obvious breach of the covenant); *Quill Co., Inc. v. A.T. Cross Co.*, 477 A.2d 939, 943 (R.I. 1984) ("In the absence of contrary evidence, sufficient effect is given the usual covenant not to sue if, in addition to its service as a defense, it is read as imposing liability only for suits brought in *obvious breach or otherwise in bad faith*").

The above analysis also accords with a recent South Carolina Court of Appeals decision filed on October 24, 2012. In the decision of *Benedict College v. National Credit Systems, Inc. v. Ford, et al.*: Opinion No. 5043, the South Carolina Court of Appeals analyzed whether attorney's fees and costs from an action could be pursued as special damages in a civil conspiracy claim where certain parties conspired to alter previously existing contract rights. The *Benedict* Court allowed the claim for special damages in the form of attorney's fees and costs arising out of the pending action. While not directly analogous to the cases cited above arising out of a covenant not to sue, the *Benedict* decision does support the general proposition underlying the above decision, namely, that attorney's fees and costs can form an element of

recoverable damages—if—as in this case, they flow from the complained of wrong. Here, Plaintiff plainly violated a clear and unambiguous covenant not to sue and the damages incurred by Preston due to the same are the fees and costs of this action.

Preston, therefore, respectfully requests attorney's fees be awarded in his favor against Anderson County. At trial, Preston testified and provided documentary evidence demonstrating attorney's fees paid or incurred in the amount of $711,212.68, if he prevails. (*See* Def. Ex. 37, 38, 39, 40, 41, 42, 43, and 44.) This amount totals less than a third of the amount the County has expended pursuing Preston. While the County complains the Attorney's Fees for Nelson Mullins do not have specific line items, the Nelson Mullins representation was based upon a flat fee arrangement and a contingency. Moreover, the claim constitutes damages for a breach of contract. By contrast, the Upstate Law Group, who did work on an hourly basis, has submitted hourly work detail. The instant lawsuit has been pending for three years and has involved hundreds of hours of work, a large number of time-consuming depositions, large document productions, numerous discovery disputes and hearings. Accordingly, the amount requested in fees constitutes a wholly reasonable amount particularly in light of the amount expended by the County by way of prosecution. The Court should enter judgment in Preston's favor in the amount of seven hundred and eleven thousand two hundred and twelve dollars and sixty-eight cents ($711,212.86).

IV. ALTERNATIVELY, THE COURT SHOULD AWARD PRESTON ATTORNEY'S FEES PURSUANT TO S.C. CODE § 15-77-300(A).

Alternatively, the Court should award Preston attorney's fees pursuant to S.C. Code § 15-77-300.[31] Section 15-77-300 provides in pertinent part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

S.C. Code Ann. § 15-77-300.

The South Carolina Supreme Court has identified three requirements to recover under S.C. Code Ann. § 15-77-300. They are: "(1) the party that contested the state action must be the prevailing party; (2) the court must find that the action was without substantial justification; and (3) the court must find that there are no special circumstances that would make an award unjust." *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). Here, Preston has met all three requirements.[32]

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[31] If necessary, the Court should view the alternative claim for fees as a motion for attorney's fees as provided under S.C. Code §15-77-300.

[32] South Carolina Code Ann. § 15-77-310 provides that a party shall petition for attorney's fees within thirty days following final disposition of the case, which occurs when the remittitur is filed with the Clerk of Court of Common Pleas. *McDowell v. South Carolina Dept. of Social Services,* 304 S.C. 539, 405 S.E.2d 830 (1991).

A. Preston is the prevailing party.

Should the court find that the Severance Agreement is valid then Anderson County breached the clear and unambiguous covenant not to sue in the Severance Agreement. Under such circumstances, Preston would constitute the prevailing party for purposes of S.C. Code § 15-77-300. A "prevailing party" need not be successful on all issues, but the party must be one who "successfully prosecutes the action by prevailing on the main issue and 'in whose favor the decision or verdict is rendered and judgment entered." *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990).

B. Anderson County acted without substantial justification.

Section 15-77-300 provides that attorney's fees can be recovered if Anderson County, "acted without substantial justification 'in pressing its claim against the party.'" S.C. Code § 15-77-300(1). The South Carolina Court of Appeals has held: "[i]n determining whether there was substantial justification in this case, we look to the substance and the outcome of the underlying matter." *McMillan v. South Carolina Dep't of Agric.*, 364 S.C. 60, 70, 611 S.E.2d 323, 332 (Ct. App. 2005). "Substantial justification for purposes of the state action statute means 'justified to a degree that could satisfy a reasonable person.'" *Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008) (quoting *Heath*, 302 S.C. at 183, 394 S.E.2d at 712). Thus, in determining whether Plaintiff acted with substantial justification, "the relevant question is whether [Anderson County's] position in litigating the case had a reasonable basis in law and in fact." *Id.* at 183, 394 S.E.2d at 326 (citing *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991)). "In other words, this Court must look at the [County's] actions in 'pressing its claim' to include the 'substance and outcome of the underlying matter.'" *Layman v. The State of South Carolina*, Ca. No. 05-2785, 2007 WL

4966163 (Feb. 14, 2007). Furthermore, while a state agency's "loss on the merits does not create a presumption that its position was not substantially justified, the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim." *Id.* (citing *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004); *Heath*, 302 S.C. at 183, 394 S.E.2d at 712).

In *Layman*, the court held that the plaintiffs were entitled to attorney's fees pursuant to S.C. Code § 15-77-300 where the plaintiffs were the prevailing party within the scope of the attorneys fee statute, that the State of South Carolina and South Carolina Retirement System acted without substantial justification in continuing to act in clear breach of an unambiguous contract, and that no special circumstances existed, which made the award of attorney's fees unjust. 2007 WL 4966163. In that case, the contributions from old retirement (TERI) participants were withheld, in clear violation of the terms of the contract. *Id.*

Similarly, in the instant case, Anderson County "acted without substantial justification" in suing Preston in clear violation of the covenant not to sue under the Severance Agreement. Anderson County's action was a clear breach of the covenant not to sue, which had been negotiated as part of the Severance Agreement. Anderson County is bound by the Severance Agreement and its position in challenging the validity of the contract has no basis under South Carolina, nor in fact.

The evidence and argument presented to the Court at trial clearly demonstrates that Anderson County's actions lack substantial justification. First, Anderson County has presented no colorable evidence rebutting the testimony of those County Council members (discussed *supra*) who voted in favor of the Severance Agreement and articulated clear and prudent

reasons why such vote served Anderson County's best interest. Second, the utter lack of proportionality between what the County has expended pursuing Preston and what it could recover, even if it had a case, evidences the motivation behind this lawsuit is not to serve the public but to exact private vengeance. Third, as noted *supra*, the County has engaged in a pattern of behavior both before and during this lawsuit which underscores the lack of substantial justification. *See supra* (Discussing Unclean Hands Doctrine).

C. No special circumstances exist to make an award of fees unjust.

No special circumstances render it unjust for Preston to be awarded fees. The County ground the instant lawsuit forward for a period of three years. The County knew from the inception of the case that Preston had asserted a counterclaim for attorney's fees. Thus, the County knew from the case's beginning that Preston would pursue his fees against it, if he prevailed. Nonetheless, the County pushed the case, even though it understood years ago (literally) that its claims lacked legal and factual support. Moreover, the Severance Agreement contained a clear and unambiguous covenant not sue, which the County chose to ignore without justification. Accordingly, the Court should award Preston

Moreover, it would be unjust not to require Anderson County to pay attorney's fees, as the attorneys will otherwise receive woefully inadequate compensation for their almost three-year long efforts in defending this lawsuit. The severance agreement was reasonable in light of Preston's Master Employment Agreement and tort claims. Pursuant to the Severance Agreement, Anderson County and Preston entered into a covenant not to sue, which Anderson County has clearly breached without substantial justification. Therefore, Preston is entitled to and should be awarded attorney's fees pursuant to S.C. Code § 15-77-300 in the amount of

seven hundred and eleven thousand two hundred and twelve dollars and sixty-eight cents ($711,212.86).

CONCLUSION

For the reasons stated above, the Court should enter judgment in Preston's favor in the amount of seven hundred and eleven thousand two hundred and twelve dollars and sixty-eight cents ($711,212.86).

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